

(b) The agreement may be terminated by either party on 60 calendar days written notice.

(c) OPM may modify this agreement unilaterally through the rule making process described in sections 553, 1103, and 1105 of title 5, United States Code.

## PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

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AUTHORITY: 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321–102; Sec. 842.107 also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and Sec. 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under Sec. 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.109 also issued under Sec. 1622(b) of Public Law 104–106, 110 Stat. 515; Sec. 842.208 also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.304 and 842.305 also issued under Sec. 321(f) of Pub. L. 107–228, 116 Stat. 1383, Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under Sec. 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under Sec. 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under Sec. 4005 of Pub. L. 101–239, 103 Stat. 2106 and Sec. 7001 of Pub. L. 101–508, 104 Stat. 1388; Subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under Sec. 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also issued under Sec. 226(c)(2) of Public Law 108–176, 117 Stat. 2529; Subpart J also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042.

### Subpart A—Coverage

SOURCE: 51 FR 47197, Dec. 31, 1986, unless otherwise noted.

#### § 842.101 Purpose and scope.

(a) This subpart contains regulations concerning automatic coverage under the Federal Employees Retirement System (FERS). References to FERS coverage in this subpart are to automatic, as opposed to elective, FERS coverage.

(b) Part 846 of this chapter contains regulations concerning elective FERS

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coverage. FERS elections are available under limited circumstances to employees not subject to automatic FERS coverage.

[59 FR 64282, Dec. 14, 1994]

### § 842.102 Definitions.

In this subpart—

*CSRS* means the Civil Service Retirement System as described in subchapter III of chapter 83 of title 5, United States Code;

*Employee* means the following individuals listed in 5 U.S.C. 8401(11) whose service is employment for the purposes of title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1954:

(a) An employee as defined by 5 U.S.C. 2105;

(b) A U.S. Commissioner whose total pay for services performed as Commissioner is not less than \$3,000 in each of the last three consecutive calendar years ending after December 31, 1954;

(c) An individual employed by a county committee established under 16 U.S.C. 590h(b);

(d) An individual employed by Galaudet College;

(e) An individual appointed to a position on the office staff of a former President under section 1(b) of the "Act of August 25, 1958" (72 Stat 838);

(f) An alien (1) who was previously employed by the Government; (2) who is employed full time by a foreign government to protect or further the interests of the United States during an interruption of diplomatic or consular relations; and (3) for whose services reimbursement is made to the foreign government by the United States;

(g) A Congressional employee as defined in 5 U.S.C. 2107, including a temporary Congressional employee and an employee of the Congressional Budget Office; and

(h) The following individuals are excluded from the definition of "employee" in 5 U.S.C. 8401 (11):

(1) A justice or judge of the United States as defined by 28 U.S.C. 451;

(2) A temporary employee of the Administrative Office of the United States Courts or of a court named by 28 U.S.C. 610;

(3) A construction employee or other temporary, part-time, or intermittent

employee of the Tennessee Valley Authority;

(4) A student employee as defined by 5 U.S.C. 5351;

(5) Teachers in dependents' schools of the Department of Defense in overseas areas with respect to Federal employment, other than teaching, performed during a recess period between two school years;

(6) An individual subject to another retirement system for Government employees (other than an employee of the United States Park Police, or the United States Secret Service) any of whose civilian employment after December 31, 1983, is employment subject to social security; and

(7) An individual excluded by OPM regulation in §842.105.

*FERS* means the Federal Employees Retirement System as described in chapter 84 of title 5, United States Code.

*Member* has the same meaning provided in 5 U.S.C. 2106, except that the term does not include an individual who irrevocably elects, by written notice to the official by whom such individual is paid, not to participate in FERS.

*NAF employee* means an employee of an instrumentality described in section 2105(c) of title 5, United States Code.

*OPM* means the Office of Personnel Management.

*Social security* means coverage under the Old Age, Survivors, and Disability Insurance (OASDI) programs of the Social Security Act.

[51 FR 47197, Dec. 31, 1986, as amended at 52 FR 25197, July 6, 1987; 56 FR 4931, Feb. 7, 1991]

### § 842.103 General.

To be covered under FERS, an individual must:

(a) Be an employee, Member, or specifically covered by another provision of law;

(b) Be covered by social security;

(c) Have retirement deductions withheld from pay and have agency contributions made; and

(d) Be paid based on units of time.

Except as provided in §842.104 and as excluded by §842.105, an employee or Member is covered by FERS.

**§ 842.104 Statutory exclusions.**

(a) *Lack of social security coverage.* An individual not covered by social security (title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1954), including an individual covered by full CSRS (and thereby excluded from social security coverage), is excluded from FERS coverage.

(b) *Senior officials subject to social security coverage despite continuous service.* An individual who has served without a break in service of more than 365 days since December 31, 1983, in one or more of the following positions is excluded from FERS coverage.

(1) The Vice President;

(2) A Member of Congress;

(3) A non-SES appointee to a position listed in 5 U.S.C. 5312 through 5317;

(4) A Senior Executive Service or Senior Foreign Service noncareer appointee; or

(5) An individual appointed by the President (or his designee) or the Vice President under section 105(a)(1), 107(a)(1), or (b)(1) of title 3, United States Code, to a position for which the maximum rate of basic pay payable is at or above the rate for Level V of the Executive Schedule.

(c) *Employees rehired after December 31, 1986, following a break in service.* An employee who is rehired after December 31, 1986, who has had a break in service and who, at the time of the last separation from the service, had at least 5 years of civilian service creditable under CSRS rules, any part of which was covered by CSRS or the Foreign Service Retirement System, is excluded from FERS coverage.

(d) *Employees who have not had a break in service ending after December 31, 1986.* An employee who has not had a break in service of more than 3 days ending after December 31, 1986, and who, as of December 31, 1986, had at least 5 years of credible civilian service under CSRS rules (even if none of this service was covered by CSRS), is excluded from FERS coverage.

(e) *Break in service.* For the purposes of paragraph (c) and (d) of this section, “break in service” means a separation from CSRS-covered service lasting at least 4 days, or a transfer or separation of less than 4 days when the employee becomes subject to automatic coverage

under social security (title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1954).

(f) *Coverage under a retirement system for NAF employees.* An employee who has elected coverage under a retirement system for NAF employees in accordance with part 847 of this chapter is excluded from FERS coverage during that and all subsequent periods of service, including service as a reemployed annuitant.

(g) *Certain Federal employees who elect to continue coverage under a retirement system for employees of the District of Columbia.* (1) A former employee of the District of Columbia who is appointed in a Federal position by the Department of Justice, or by the Court Services and Offender Supervision Agency established by section 11233(a) of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(c) of Pub. L. 105–274, 112 Stat. 2419, is excluded from FERS coverage beginning on the date of the Federal appointment, if the employee elects to continue coverage under a retirement system for employees of the District of Columbia under section 3 of Pub. L. 105–274, 112 Stat. 2419, and if the following conditions are met:

(i) The employee is hired by the Department of Justice or by the Court Services and Offender Supervision Agency during the period beginning August 5, 1997, and ending 1 year after the date on which the Lorton Correctional Complex is closed, or 1 year after the date on which the Court Services and Offender Supervision Agency assumes its duties, whichever is later; and

(ii) The employee elects to continue coverage under a retirement system for employees of the District of Columbia no later than June 1, 1999 or 60 days after the date of the Federal appointment, whichever is later.

(2) An individual’s election to continue coverage under a retirement system for employees of the District of Columbia remains in effect until the individual separates from service with the Department of Justice or the Court Services and Offender Supervision Agency.

[59 FR 64283, Dec. 14, 1994, as amended at 61 FR 41720, Aug. 9, 1996; 64 FR 15289, Mar. 31, 1999]

**§ 842.105 Regulatory exclusions.**

(a) OPM is authorized in 5 U.S.C. 8402(c)(1) to “exclude from the operation of this chapter an employee or group of employees in or under an Executive agency, the United States Postal Service, or the Postal Rate Commission, whose employment is temporary or intermittent, except an employee whose employment is part-time career employment (as defined in section 3401(2)).” Therefore, under this authority, OPM is excluding the following:

(1) Employees serving under appointments limited to 1 year or less, unless such appointments meet the definition of provisional appointments contained in §§ 316.401 and 316.403 of this chapter; and

(2) Intermittent employees serving under other than career or career conditional appointments.

(b) When an employee who is covered by FERS moves to a position listed in paragraph (a) of this section without a break in service or after a separation of 3 days or less, his or her FERS coverage will continue, except in the case of an employee hired by the Census Bureau under a temporary, intermittent appointment to perform decennial census duties.

(c) Paragraph (a) of this section does not deny FERS coverage to an employee who receives an interim appointment under § 772.102 of this chapter and was covered by FERS at the time of the separation for which interim relief is required.

[51 FR 47197, Dec. 31, 1986, as amended at 56 FR 10143, Mar. 11, 1991; 57 FR 3714, Jan. 31, 1992; 63 FR 9402, Feb. 25, 1998]

**§ 842.106 Elections of retirement coverage under the District of Columbia Financial Responsibility and Management Assistance Act of 1995.**

(a) *Who may elect*—(1) *General rule.* Any individual appointed by the District of Columbia Financial Responsibility and Management Assistance Authority (the Authority) in a position not excluded from FERS coverage under § 842.105 may elect to be deemed a Federal employee for FERS purposes unless the employee has elected to participate in a retirement, health or life

insurance program offered by the District of Columbia.

(2) *Exception.* A former Federal employee being appointed by the Authority on or after October 26, 1996, no more than 3 days (not counting District of Columbia holidays) after separation from Federal employment cannot elect to be deemed a Federal employee for FERS purposes unless the election was made before separation from Federal employment.

(b) *Procedure for making an election.* The Authority or the agency providing administrative support services to the Authority (Administrative Support Agency) must establish a procedure for notifying employees of their election rights and for accepting elections.

(c) *Time limit for making an election.* (1) An election under paragraph (a)(1) of this section must be made within 30 days after the employee received the notice under paragraph (b) of this section.

(2) The Authority or its Administrative Support Agency will waive the time limit under paragraph (c)(1) of this section upon a showing that—

(i) The employee was not advised of the time limit and was not otherwise aware of it; or

(ii) Circumstances beyond the control of the employee prevented him or her from making a timely election and the employee thereafter acted with due diligence in making the election.

(d) *Effect of an election.* (1) An election under paragraph (a) of this section is effective on the commencing date of the employee’s service with the Authority.

(2) An individual who makes an election under paragraph (a) of this section is ineligible, during the period of employment covered by that election, to participate in any retirement system for employees of the government of the District of Columbia.

(e) *Irrevocability.* An election under paragraph (a) of this section becomes irrevocable when received by the Authority or its Administrative Support Agency.

(f) *Employee deductions.* The Authority or its Administrative Support Agency must withhold, from the pay of

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an employee of the District of Columbia Financial Responsibility and Assistance Authority who has elected to be deemed a Federal employee for FERS purposes, an amount equal to the percentage withheld from Federal employees' pay for periods of service covered by FERS and, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from an employee's pay.

(g) *Employer contributions.* The District of Columbia Financial Responsibility and Assistance Authority must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions required under FERS.

[61 FR 58459, Nov. 15, 1996]

**§ 842.107 Employees covered under the National Capital Revitalization and Self-Government Improvement Act of 1997.**

The following categories of employees of the District of Columbia Government are deemed to be Federal employees for FERS purposes on and after October 1, 1997:

(a) Nonjudicial employees of the District of Columbia Courts;

(b) The District of Columbia Department of Corrections Trustee, authorized by section 11202 of Pub. L. 105-33, 111 Stat. 251, and an employee of the Trustee if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less;

(c) The District of Columbia Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee, authorized by section 11232 of Pub. L. 105-33, 111 Stat. 251, as amended by section 7(b) of Pub. L. 105-274, 112 Stat. 2419, and an employee of the Trustee, if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less.

[62 FR 50997, Sept. 30, 1997, as amended at 64 FR 15289, Mar. 31, 1999]

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**§ 842.108 Employees covered under the District of Columbia Courts and Justice Technical Corrections Act of 1998.**

Employees of the Public Defender Service of the District of Columbia are deemed to be Federal employees for FERS purposes on and after April 1, 1999.

[64 FR 15289, Mar. 31, 1999]

**§ 842.109 Continuation of coverage for former Federal employees of the Civilian Marksmanship Program.**

(a) A Federal employee who was covered under FERS;

(1) Was employed by the Department of Defense to support the Civilian Marksmanship Program as of the day before the date of the transfer of the Program to the Corporation for the Promotion of Rifle Practice and Firearms Safety; and

(2) Was offered and accepted employment by the Corporation as part of the transition described in section 1612(d) of Public Law 104-106, 110 Stat. 517—remains covered by FERS during continuous employment with the Corporation unless the individual files an election under paragraph (c) of this section. Such a covered individual is treated as if he or she were a Federal employee for purposes of this part, and of any other part within this title relating to FERS. The individual is entitled to the benefits of, and is subject to all conditions under, FERS on the same basis as if the individual were an employee of the Federal Government.

(b) Cessation of employment with the Corporation for any period terminates eligibility for coverage under FERS during any subsequent employment by the Corporation.

(c) An individual described by paragraph (a) of this section may at any time file an election to terminate continued coverage under the Federal benefits described in § 1622(a) of Public Law 104-106, 110 Stat. 521. Such an election must be in writing and filed with the Corporation. It takes effect immediately when received by the Corporation. The election applies to any and all Federal benefits described by section 1622(a) of Public Law 104-106, 110 Stat. 521, and is irrevocable. The Corporation must transmit the election to

OPM with the individual's retirement records.

(d) The Corporation must withhold from the pay of an individual described by paragraph (a) of this section an amount equal to the percentage withheld from the pay of a Federal employee for periods of service covered by FERS and, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from the individual's pay.

(e) The Corporation must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions required under FERS.

[74 FR 66566, Dec. 16, 2009]

### Subpart B—Eligibility

SOURCE: 52 FR 4473, Feb. 11, 1987, unless otherwise noted.

#### § 842.201 Purpose.

This subpart regulates the statutory provisions on eligibility for nondisability retirement under the Federal Employees Retirement System (FERS).

#### § 842.202 Definitions.

In this subpart—

*Commuting area* has the same meaning given that term in § 351.203 of this chapter.

*Minimum retirement age* means an age based on an individual's year of birth, as follows:

| Year of Birth        | Minimum Retirement Age  |
|----------------------|-------------------------|
| Before 1948 .....    | 55 years.               |
| 1948 .....           | 55 years and 2 months.  |
| 1949 .....           | 55 years and 4 months.  |
| 1950 .....           | 55 years and 6 months.  |
| 1951 .....           | 55 years and 8 months.  |
| 1952 .....           | 55 years and 10 months. |
| 1953–1964 .....      | 56 years.               |
| 1965 .....           | 56 years and 2 months.  |
| 1966 .....           | 56 years and 4 months.  |
| 1967 .....           | 56 years and 6 months.  |
| 1968 .....           | 56 years and 8 months.  |
| 1969 .....           | 56 years and 10 months. |
| 1970 and after ..... | 57 years.               |

#### § 842.203 General eligibility requirement.

An employee must have at least 5 years of civilian service creditable

under FERS to be eligible for an annuity under this subpart, except as provided under part 846 of this chapter.

#### § 842.204 Immediate voluntary retirement—basic age and service requirements.

(a) An employee or Member who separates from service is entitled to an annuity—

(1) Except as provided in paragraph (d) of this section, after attaining the minimum retirement age and completing 10 years of service; or

(2) After becoming age 60 and completing 20 years of service; or

(3) After becoming age 62 and completing 5 years of service.

(b)(1) Except as provided in paragraph (b)(2) or (c) of this section, an annuity payable under paragraph (a) of this section commences on the first day of the month following separation.

(2) An annuity payable under paragraph (a) of this section commences on the day after separation, if that separation occurs upon the expiration of a term (or other period) for which the individual was appointed or elected.

(c)(1) An employee or Member entitled to an annuity under paragraph (a)(1) of this section may elect to postpone the commencing date of that annuity, provided the individual—

(i) Has completed less than 30 years of service; and

(ii) Is not entitled to an immediate annuity under any other provision of this subpart. An immediate annuity means an annuity that will begin within 31 days of separation.

(2) A postponed commencing date may not precede the later of—

(i) The first day of the month after the date of separation of the employee or Member; or

(ii) The 31st day after the date of filing the election of a commencing date.

(3) A postponed commencing date must be no later than the second day before the employee's 62nd birthday.

(4) The election of a commencing date may be filed not more than 90 days before the commencing date elected by the employee or Member, and must be filed in a form prescribed by the Office of Personnel Management (OPM).

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(5) A written election that is not in the prescribed form, but which designates a specific commencing date, and otherwise conforms to the time limits in paragraphs (c)(2) through (c)(4) of this section, will be accepted as an informal election subject to ratification in the prescribed form.

(6) The election of a commencing date becomes irrevocable on the date OPM authorizes the first annuity payment.

(d)(1) If an employee or Member separates from service after attaining the minimum retirement age and completing 10 years of service, but is reemployed before filing an application for retirement based on that separation, the individual may not elect an annuity commencing date that precedes separation from the reemployment service.

(2) In the case of an employee or Member who separates from service after attaining the minimum retirement age and completing 10 years of service, and is reemployed after filing an application for retirement based on that separation, that individual may not elect an annuity commencing date that precedes separation from the reemployment service if he or she is reemployed prior to a postponed commencing date elected under paragraph (c) of this section.

[51 FR 47197, Dec. 31, 1986, as amended at 56 FR 65418, Dec. 17, 1991]

**§ 842.206 Involuntary retirement.**

(a) An employee, other than an employee entitled to an annuity under § 842.207 or § 842.208, who separates from the service involuntarily after completing 25 years of service, or after becoming age 50 and completing 20 years of service is entitled to an annuity, except as provided in paragraphs (b) and (c) of this section.

(b) An employee who is separated from cause on charges of misconduct or delinquency is not entitled to an annuity under paragraph (a) of this section.

(c) An employee who would otherwise be entitled to an annuity under paragraph (a) of this section is not so entitled if the employee has declined a reasonable offer of another position that meets all of the following conditions:

(1) The offer must be made in writing;

(2) The employee must meet established qualification requirements; and

(3) The offered position must be—

(i) In the employee's agency, including an agency to which the employee would be transferred in a transfer of function(s) between agencies;

(ii) Within the employee's commuting area unless geographic mobility is a condition of the employee's employment;

(iii) Of the same tenure and work schedule; and

(iv) Not lower than the equivalent of two grades or pay levels below the employee's current grade or pay level, without consideration of the employee's eligibility to retain his or her current grade or pay under part 536 of this chapter or other authority. In movements between pay schedules or pay systems, the comparison rate of the grade or pay level that is two grades below that of the current position will be compared with the comparison rate of the grade or pay level of the offered position. For this purpose, "comparison rate" has the meaning given that term in § 536.103 of this chapter, except paragraph (2) of that definition should be used for the purpose of comparing grades or levels of work in making reasonable offer determinations in all situations not covered by paragraph (1) of that definition.

(d) An annuity payable under paragraph (a) of this section commences on the day after separation from the service.

[52 FR 4473, Feb. 11, 1987, as amended at 70 FR 31315, May 31, 2005; 73 FR 66157, Nov. 7, 2008]

**§ 842.207 Air traffic controllers.**

(a) An employee who separates from service, except by removal for cause or charges of delinquency or misconduct, is entitled to an annuity—

(1) After completing 25 years of service as an air traffic controller; or

(2) After becoming age 50 and completing 20 years of service as an air traffic controller.

(b) An annuity payable under paragraph (a) of this section commences on the first day of the month following separation.

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**§ 842.211**

**§ 842.208 Firefighters, customs and border protection officers, law enforcement officers, members of the Capitol or Supreme Court Police, and nuclear materials couriers.**

(a) An employee who separates from service, except by removal for cause on charges of delinquency or misconduct, is entitled to an annuity—

(1) After completing any combination of service as a firefighter, customs and border protection officer, law enforcement officer, member of the Capitol or Supreme Court Police, or nuclear materials courier totaling 25 years; or

(2) After becoming age 50 and completing any combination of service as a firefighter, customs and border protection officer, law enforcement officer, member of the Capitol or Supreme Court Police, or nuclear materials courier totaling 20 years.

(b) An annuity payable under paragraph (a) of this section commences on the first day of the month following separation.

[52 FR 4473, Feb. 11, 1987, as amended at 65 FR 2524, Jan. 18, 2000; 76 FR 42000, July 18, 2011]

**§ 842.209 Members of Congress.**

(a) A Member, except one separated by resignation or expulsion, is entitled to an annuity—

(1) After completing 25 years of service; or

(2) After becoming age 50 and completing 20 years of service.

(b) An annuity payable under paragraph (a) of this section commences on the day after separation from the service.

**§ 842.210 Military reserve technicians.**

(a) A military reserve technician as defined in 5 U.S.C. 8401(30) who is separated from civilian service because of ceasing to qualify as a member of a military reserve component after reaching age 50 and completing 25 years of service is entitled to an annuity.

(b) An annuity payable under paragraph (a) of this section commences on the day after separation.

**§ 842.211 Senior Executive Service, Defense Intelligence Senior Executive Service, and Senior Cryptologic Executive Service.**

(a) A member of the Senior Executive Service, the Defense Intelligence Senior Executive Service, or the Senior Cryptologic Senior Executive Service who is removed or who resigns after receipt of written notice of proposed removal for less than fully successful executive performance, or for failure to be recertified as a senior executive, is entitled to an annuity—

(1) After completing 25 years of service; or

(2) After becoming age 50 and completing 20 years of service.

(b) *Removed for less than fully successful executive performance* means (1) with respect to a member of the Senior Executive Service, removal in accordance with procedures in subpart E of part 359 of this chapter; and (2) with respect to a member of the Defense Intelligence Senior Executive Service or the Senior Cryptologic Executive Service, a certification by the head of the Defense Intelligence Agency or National Security Agency (or their designees) that the employee has been removed for less than fully successful executive performance.

(c) *Removed for failure to be recertified as a senior executive* means (1) With respect to a member of the Senior Executive Service, removal in accordance with the procedures in subpart C of part 359 of this chapter, and (2) with respect to a member of the Defense Intelligence Senior Executive Service or the Senior Cryptologic Executive Service, a certification by the head of the Defense Intelligence Agency or National Security Agency (or their designees) that the employee has been removed for failure to be recertified under 10 U.S.C. 1601(a) or section 12(a)(1) of the National Security Agency Act, respectively.

(d) An annuity payable under paragraph (a) of this section commences on the day after separation from service.

[52 FR 4473, Feb. 11, 1987, as amended at 56 FR 173, Jan. 3, 1991]

## § 842.212

## 5 CFR Ch. I (1–1–13 Edition)

### § 842.212 Deferred retirement.

(a) An employee or Member who, after completing 5 years of service, separates from service or transfers to a position not covered by FERS is entitled to a deferred annuity beginning on the first day of the month after the individual attains age 62.

(b)(1) Except as provided in paragraphs (b)(3) and (c) of this section, an employee or Member who has not attained the minimum retirement age, and who, after completing 10 years of service, is separated or transferred to a position in which the individual is no longer covered by FERS, is entitled to a deferred annuity commencing—

(i) The first day of the month following the date on which the individual attains the minimum retirement age or, if later,

(ii) A date the individual designates that follows the date on which the designation is filed.

(2) The election of a commencing date may be filed no more than 90 days before that commencing date, and must be elected in a form prescribed by OPM. A written election that is not in the prescribed form, but which designates a specific commencing date, will be accepted for as an informal election, subject to ratification in the prescribed form.

(3) An employee or Member is not entitled to a deferred annuity under paragraph (b)(1) of this section if the individual is eligible for an annuity under §§ 842.205 through 842.211 or will, within 31 days after filing the election of a commencing date, attain age 62.

(4) The election of a commencing date becomes irrevocable on the date OPM authorizes the first annuity payment.

(c)(1) If an employee or Member separates from service after completing 10 years of service but before attaining the minimum retirement age, and is reemployed before filing an application for retirement based on that separation, that individual may not elect an annuity commencing date that precedes separation from the reemployment service.

(2) In the case of an employee or Member who separates from service after completing 10 years of service but before attaining the minimum retire-

ment age, and is reemployed after filing an application for retirement based on that separation, that individual may not elect an annuity commencing date that precedes separation from the reemployment service if he or she is reemployed prior to a postponed commencing date elected under paragraph (b).

[51 FR 47197, Dec. 31, 1986, as amended at 56 FR 65418, Dec. 17, 1991]

### § 842.213 Voluntary early retirement—substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring.

(a) A *specific designee* is defined as a senior official within an agency who has been specifically designated to sign requests for voluntary early retirement authority under a designation from the head of the agency. Examples include a Chief Human Capital Officer, an Assistant Secretary for Administration, a Director of Human Resources Management, or other official.

(b) An agency's request for voluntary early retirement authority must be signed by the head of the agency or by a specific designee.

(c) The request must contain the following information:

(1) Identification of the agency or specified component(s) for which the authority is being requested;

(2) Reasons why the agency needs voluntary early retirement authority. This must include a detailed summary of the agency's personnel and/or budgetary situation that will result in an excess of personnel because of a substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping, consistent with agency human capital goals;

(3) The date on which the agency expects to effect the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;

(4) The time period during which the agency plans to offer voluntary early retirement;

(5) The total number of non-temporary employees in the agency (or specified component(s));

(6) The total number of non-temporary employees in the agency (or specified component(s)) who may be involuntarily separated, downgraded, transferred, or reassigned as a result of the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;

(7) The total number of employees in the agency (or specified component(s)) who are eligible for voluntary early retirement;

(8) An estimate of the total number of employees in the agency (or specified component(s)) who are expected to retire early during the period covered by the request for voluntary early retirement authority; and

(9) A description of the types of personnel actions anticipated as a result of the agency's need for voluntary early retirement authority. Examples include separations, transfers, reassignments, and downgradings.

(d) OPM will evaluate a request for voluntary early retirement based on:

(1) A specific request to OPM from the agency for voluntary early retirement authority;

(2) A voluntary separation incentive payment implementation plan, as discussed in part 576, subpart A, of this chapter, which must outline the intended use of the incentive payments and voluntary early retirement; or

(3) The agency's human capital plan, which must outline its intended use of voluntary separation incentive payments and voluntary early retirement authority, and the changes in organizational structure it expects to make as the result of projected separations and early retirements.

(e) Regardless of the method used, the request must include all of the information required by paragraph (c) of this section.

(f) OPM may approve an agency's request for voluntary early retirement authority to cover the entire period of the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping described by the agency, or the initial portion of that period with a requirement for subsequent information and justification if the period covers multiple years.

(g) After OPM approves an agency's request, the agency must immediately notify OPM of any subsequent changes in the conditions that served as the basis for the approval of the voluntary early retirement authority. Depending upon the circumstances involved, OPM will modify the authority as necessary to better suit the agency's needs.

(h) The agency may further limit voluntary early retirement offers based on:

(1) An established opening and closing date for the acceptance of applications that is announced to employees at the time of the offer; or

(2) The acceptance of a specified number of applications for voluntary early retirement, provided that, at the time of the offer, the agency notified employees that it retained the right to limit the number of voluntary early retirements.

(i) Within the timeframe specified for its approved voluntary early retirement authority, the agency may subsequently establish a new or revised closing date, or reduce or increase the number of early retirement applications it will accept, if management's downsizing and/or reshaping needs change. If the agency issues a revised closing date, or a revised number of applications to be accepted, the new date or number of applications must be announced to the same group of employees included in the original announcement. If the agency issues a new window period with a new closing date, or a new instance of a specific number of applications to be accepted, the new window period or number of applications to be accepted may be announced to a different group of employees as long as they are covered by the approved voluntary early retirement authority.

(j) Chapter 43 of title 38, United States Code, requires that agencies treat employees on military duty, for all practical purposes, as though they were still on the job. Further, employees are not to be disadvantaged because of their military service. In accordance with these provisions, employees on military duty who would otherwise be eligible for an offer of voluntary early retirement will have 30 days following their return to duty to either accept or

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reject an offer of voluntary early retirement. This will be true even if the voluntary early retirement authority provided by OPM has expired.

(k) An employee who separates from the service voluntarily after completing 25 years of service, or becoming age 50 and completing 20 years of service, is entitled to an annuity if, on the date of separation, the employee:

(1) Is serving in a position covered by a voluntary early retirement offer; and

(2) Meets the following conditions which are covered in 5 U.S.C. 8414(b)(1)(B):

(i) Has been employed continuously, by the agency in which the employee is serving, for at least the 31-day period ending on the date on which such agency requests the determination referred to in section 842.213(b);

(ii) Is serving under an appointment that is not time limited;

(iii) Has not been duly notified that such employee is to be involuntarily separated for misconduct or unacceptable performance;

(iv) Is separated from the service voluntarily during a period in which, as determined by the Office of Personnel Management (upon request of the agency) under regulations prescribed by the Office:

(A) Such agency (or, if applicable, the component in which the employee is serving) is undergoing substantial delayering, substantial reorganization, substantial reductions in force, substantial transfer of function, or other substantial workforce restructuring (or shaping);

(B) A significant percentage of employees serving in such agency (or component) are likely to be separated or subject to an immediate reduction in the rate of basic pay (without regard to subchapter VI of chapter 53, or comparable provisions); or

(C) Identified as being in positions which are becoming surplus or excess to the agency's future ability to carry out its mission effectively; and

(v) As determined by the agency under regulations prescribed by the Office, is within the scope of the offer of voluntary early retirement, which may be made based on the following criteria:

(A) 1 or more organizational units;

(B) 1 or more occupational series or levels;

(C) 1 or more geographical locations;

(D) Specific periods;

(E) Skills, knowledge, or other factors related to a position; or

(F) Any appropriate combination of such factors.

(1) Agencies are responsible for ensuring that employees are not coerced into voluntary early retirement. If an agency finds any instances of coercion, it must take appropriate corrective action.

(m) Except as provided in paragraph (j) of this section, an agency may not offer or process voluntary early retirements beyond the stated expiration date of a voluntary early retirement authority or offer early retirements to employees who are not within the scope of the voluntary early retirement authority approved by OPM.

(n) OPM may terminate a voluntary early retirement authority if it determines that the condition(s) that formed the basis for the approval of the authority no longer exist.

(o) OPM may amend, limit, or terminate a voluntary early retirement authority to ensure that the requirements of this subpart are properly being followed.

(p) Agencies must provide OPM with interim and final reports for each voluntary early retirement authority, as covered in OPM's approval letter to the agency. OPM may suspend or cancel a voluntary early retirement authority if the agency is not in compliance with the reporting requirements or reporting schedule specified in OPM's voluntary early retirement authority approval letter.

[69 FR 33279, June 15, 2004, as amended at 69 FR 50265, Aug. 16, 2004]

**Subpart C—Credit for Service**

SOURCE: 52 FR 18193, May 14, 1987, unless otherwise noted.

**§ 842.301 Purpose.**

This subpart sets forth the provisions governing credit for service under the Federal Employees Retirement System

(FERS), 5 U.S.C. 8411. Except as provided by section 302 of the Federal Employees' Retirement System Act of 1986, Pub. L. 99-335 (the special provisions for employees who elect to transfer to FERS), service not creditable under this subpart is not creditable either for the purposes of determining eligibility to an annuity or in computing the rate of an annuity benefit under subchapter II (basic annuity), IV (survivor annuity), or V (disability annuity) of chapter 84 of title 5 of the United States Code.

#### § 842.302 Definitions.

*Cadet Nurse Corps* means any training as a student or graduate nurse under a plan approved under section 2 of the Act of June 15, 1943 (57 Stat. 153).

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*FERS* means the Federal Employees Retirement System as established under chapter 84 of title 5, United States Code.

*Government* means the Federal Government and Gallaudet College.

*Member* means a Member of Congress as defined by 5 U.S.C. 8401(20).

*Military service* means honorable active service in the armed forces of the United States; in the commissioned corps of the Public Health Service after June 30, 1960; or in the commissioned corps of the National Oceanic and Atmospheric Administration, or a predecessor entity in function, after June 30, 1961. "Military service" does not include service in the National Guard except when ordered to active duty in the service of the United States.

*Survivor* means a current spouse, a child or a former spouse who is entitled to an annuity in accordance with part 843 of this chapter.

#### § 842.303 General.

(a)(1) Except as provided in paragraph (a)(2) of this section, no service credit is allowed for a period of separation from service.

(2) Service credit is allowed for a period of separation of less than 4 days and for a period of separation during which an individual was receiving benefits under subchapter I of chapter 81 of title 5, United States Code, provided

the individual returns to duty in the Government subject to FERS.

(b) Service credit cannot be granted in excess of actual calendar time from the date of appointment to the date of separation from service.

(c) Any period of time for which service credit under chapter 84 of title 5, United States Code, is specifically allowed by a provision of law is creditable under this subpart subject to any applicable deposit requirements.

#### § 842.304 Civilian service.

(a) Except as otherwise provided under title III of the Federal Employees' Retirement System Act of 1986, an employee or Member is entitled to credit for all purposes under FERS for a period of civilian service with the Government or the U.S. Postal Service—

(1) Performed after December 31, 1986, which is covered service under subpart A of this part and for which deductions required under 5 U.S.C. 8422(a) have not been refunded;

(2) That, other than service under paragraph (a)(1) of this section—

(i) Was performed before 1989;

(ii) Would have been creditable under 5 U.S.C. 8332 if the employee or Member were subject to subchapter III of chapter 83 of title 5, United States Code, without regard to any deposit, re-deposit, or coverage requirement under that subchapter; and

(iii) Is covered by deductions or a deposit required by § 842.305 and the deductions or deposit have not been refunded after the employee or Member first became subject to FERS;

(3) That was creditable under subchapter II of chapter 8 of title 1 of the Foreign Service Act of 1980 (Foreign Service Pension System), provided—

(i) The employee or Member waives credit for the service under the Foreign Service Pension System; and

(ii) The employee or Member makes the deposit required by § 842.305, and the deposit is not refunded;

(4) While on leave of absence without pay, subject to a limit of 6 months per calendar year, except that the 6-month limit does not apply while—

(i) Performing military service; or

(ii) Receiving benefits under subchapter I of chapter 81 of title 5, United States Code;

(5) While on approved leave without pay granted to serve as a full-time officer or employee of an organization composed primarily of employees, as defined by section 8331(1) or 8401(11) of title 5, United States Code, provided—

(i) The employee elects, within 60 days after the commencing date of leave without pay, to pay to the employing agency the retirement deductions and agency contributions that would be applicable if the employee were in a pay status;

(ii) Payments of the deductions and contributions begin on a regular basis within 60 days after the commencing date of leave without pay; and

(iii) Payments of the required deductions and contributions are completed and not refunded; and

(6) While assigned on detail or leave without pay to a State or local government under 5 U.S.C. 3373, provided—

(i) The normal cost percentage (under subpart D of part 841 of this chapter) for the employee (who is deemed to continue in the same normal cost percentage category as applicable on the date of the assignment) is remitted to OPM for each pay period during the assignment; and

(ii) The employee, or, if he or she dies without making an election, his or her survivor, does not elect to receive benefits under any State or local government retirement law or program, which OPM determines to be similar to FERS.

(b) *Cadet Nurse Corps.* (1) Service credit is allowed under Pub. L. 99–638 for a period of service performed with the Cadet Nurse Corps provided—

(i) The service totaled 2 years or more;

(ii) The individual submits an application for service credit to OPM no later than January 10, 1988;

(iii) The individual is employed by the Federal Government in a position subject to subchapter III of chapter 83 of title 5, United States Code (other than 5 U.S.C. 8344) or chapter 84 of that title (other than 5 U.S.C. 8468) at the time he or she applies to OPM for service credit under this provision; and

(iv) The individual makes a deposit for the service in accordance with § 842.305(g) before the date of separation from service on which the individual's entitlement to annuity is based.

(c) *National Guard technician service before January 1, 1969—(1) Definition.* In this section, *service as a National Guard technician* is service performed under section 709 of title 32, United States Code (or under a prior corresponding provision of law) before January 1, 1969.

(2) *Employees on or after November 6, 1990.* Employees, subject to FERS retirement deductions, whose only service as a National Guard technician was performed prior to January 1, 1969, are entitled to credit under FERS if they—

(i) Submit to OPM an application for service credit in a form prescribed by OPM;

(ii) Are employed by the Federal Government in a position subject to FERS retirement deductions after November 5, 1990; and

(iii) Complete the deposit for the service through normal service credit channels before final adjudication of their application for retirement or have the deposit deemed made when they elect the alternative form of annuity.

(3) *Former Federal employees.* Former Federal employees who were subject to FERS retirement deductions and separated after December 31, 1968, but before November 6, 1990, with title to a deferred annuity, may make a deposit for pre-1969 National Guard technician service provided they—

(i) Submit a written application for the pre-1969 National Guard technician service to OPM before November 6, 1991; and

(ii) Complete a deposit for the additional service in a lump sum or in installment payments of \$50 or more. Payments must be completed before their retirement claim is finally adjudicated, unless the deposit is deemed made when they elect an alternative form of annuity.

(4) *Annuity and survivors.* (i) Individuals who were entitled to receive an immediate annuity (or survivor annuity benefits) as of November 6, 1990, may make a deposit for pre-1969 National Guard technician service provided they—

(A) Submit a written application for service credit to OPM before November 6, 1991; and

(B) Complete a deposit for the additional service in a lump sum or in equal monthly annuity installments to be completed within 24 months of the date of the written application.

(ii) To determine the commencing date of the deposit installment payment period for annuitants and survivors, the “date of application” will be considered to be the first day of the second month beginning after OPM receives a complete written application from the individual.

(iii) To be a complete application, the individual’s written request for pre-1969 National Guard technician service credit must also include a certification of the dates of employment and the rates of pay received by the individual during the employment period. The individual may obtain certification of service from the Adjutant General of the State in which the service was performed.

(d) *Credit for service performed as an employee of a nonappropriated fund instrumentality.* (1) Credit for service with a nonappropriated fund instrumentality is allowed in accordance with an election under 5 CFR part 847, subpart D or H.

(2) Service under FERS for which the employee withdrew all deductions is creditable in accordance with an election made under 5 CFR part 847, subpart D.

(3) An annuity that includes credit for service with a nonappropriated fund instrumentality under 5 CFR part 847, subpart D, or refunded service under paragraph (d)(2) of this section is computed under 5 CFR part 847, subpart F.

(4) An annuity that includes credit for service with a nonappropriated fund instrumentality under 5 CFR part 847, subpart H, is computed under 5 CFR part 847, subpart I.

(e) *Certain Government service performed abroad after December 31, 1988, and before May 24, 1998—(1) Definition.* In this section, *certain Government service performed abroad* is service performed at a United States diplomatic mission, consular post (other than a consular agency), or other Foreign Service post abroad under a temporary

appointment pursuant to sections 309 and 311 of the Foreign Service Act of 1980 (22 U.S.C. 3949 and 3951).

(2) *Conditions for Creditability.* Service credit is allowed under section 321 of Pub. L. 107-228 for certain Government service performed abroad after December 31, 1988, and before May 24, 1998, provided—

(i) The service in the aggregate totaled 90 days or more;

(ii) The individual performing the service would have satisfied all eligibility requirements under regulations of the Department of State (as in effect on September 30, 2002) for a family member limited noncareer appointment (within the meaning of such regulations, as in effect on September 30, 2002) at the time the service was performed, except that, in applying this paragraph, an individual not employed by the Department of State while performing the service shall be treated as if then so employed;

(iii) The service would have been creditable under FERS had it been performed before 1989 and had the deposit requirements of § 842.305 been met;

(iv) The service is not otherwise creditable under FERS or any other retirement system for employees of the U.S. Government (disregarding title II of the Social Security Act);

(v) The individual applying for the service credit submits a written application to make a deposit with the department or agency where the service was performed, and completes the deposit, in accordance with § 842.305(j); and

(vi) The department or agency where the service was performed remits Government contributions for the service to OPM in accordance with § 842.305(j).

(3) *Departments or agencies no longer in existence.* If the department or agency where the individual performed certain Government service abroad no longer exists, the Department of State must process applications for service credit under this section. Government contributions for the service will not need to be remitted to OPM.

[52 FR 18193, May 14, 1987, as amended at 56 FR 6554, Feb. 19, 1991; 56 FR 55596, Oct. 29, 1991; 61 FR 41720, Aug. 9, 1996; 68 FR 2178, Jan. 16, 2003; 70 FR 50953, Aug. 29, 2005]

## § 842.305

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### § 842.305 Deposits for civilian service.

(a) *Eligibility—current and former employees or Members.* An employee or Member subject to FERS and a former employee or Member who is entitled to an annuity may make a deposit for civilian service described under paragraphs (a)(2) and (a)(3) of § 842.304 upon application to OPM in a form prescribed by OPM. A deposit for civilian service cannot be made later than 30 days after the first regular monthly payment as defined in § 842.602.

(b) *Eligibility—survivors.* If an employee or Member was, at the time of death, eligible to make a deposit, the employee's survivor may make the deposit for civilian service. A deposit under this paragraph cannot be made after adjudication of the survivor's application for benefits becomes final, which is 30 days after the date of OPM's notice to the survivor of the annuity rates with and without making the deposit.

(c) *Distinct period of service.* A deposit is not considered to have been made for any distinct period of service unless the total amount due for the period is paid in full. A distinct period of civilian service for this purpose is a period of civilian service that is not interrupted by a break in service of more than 3 days.

(d) *Amount of deposits.* The amount of a deposit for a period of service under § 842.304(a)(2) equals 1.3 percent of the basic pay for the service, plus interest. The amount of a deposit for a period of service under § 842.304(a)(3) equals the amount that would have been deducted from pay under 5 U.S.C. 8422(a) had the employee been subject to FERS during the service, plus interest.

(e) *Interest.* (1) Interest is charged at the rate of 4 percent a year through December 31, 1947; 3 percent a year beginning January 1, 1948, through December 31, 1984; and thereafter at a rate as determined by the Secretary of the Treasury for each calendar year that equals the overall average yield to the Civil Service Retirement and Disability Fund (the Fund) during the preceding fiscal year from all obligations purchased by the Secretary during such fiscal year under 5 U.S.C. 8348 (c), (d), and (e).

(2) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case; but, whenever applicable, the rule of average applies.

(3) Interest is computed from the midpoint of each service period included in the computation. The interest accrues annually on the outstanding portion, and is compounded annually, until the portion is deposited. Interest is not charged after the commencing date of annuity or for a period of separation from the service that began before October 1, 1956.

(f) *Forms of deposit.* Deposits may be made in a single lump sum or in installments not smaller than \$50 each.

(g) *Cadet Nurse Corps.* (1) Upon receiving an application for service credit with the Cadet Nurse Corps, OPM will determine whether all the conditions for creditability (§ 842.304(b)) have been met; compute the deposit, including interest; and advise the employing agency and the employee of the total amount of the deposit due. The rate of basic pay for this purpose is deemed to be \$15 per month for the first 9 months of study; \$20 per month for the 10th through the 21st months of study; and \$30 per month for any month in excess of 21 months. Interest is computed in accordance with paragraph (e) of this section.

(2) The employing agency must establish a deposit account showing the total amount due and a payment schedule (unless deposit is made in one lump sum) to record the date and amount of each payment.

(3) If the individual cannot make payment in one lump sum, the employing agency must accept installment payments (by allotments or otherwise). The employing agency, however, is not required to accept individual checks in amounts less than \$50.

(4) Payments received by the employing agency must be remitted to OPM immediately for deposit to the Civil Service Retirement and Disability Fund.

(5) Once the employee's deposit has been paid in full or closed out, the employing agency must submit the documentation pertaining to the deposit to

OPM in accordance with instructions issued by OPM.

(h) *Processing applications for pre-1969 National Guard technician service credit for employees subject to FERS retirement deductions after November 5, 1990—(1) OPM determines creditable service.* OPM will determine whether all conditions for crediting the additional service have been met, compute the deposit, and notify the employee of the amount of and the procedures for submitting the deposit payments to OPM to obtain credit for the service.

(2) *Computing the deposit.* (i) For individuals who will not have a CSRS component, the deposit will be computed based on—

(A) One and three tenths percent of basic pay at the time the service was performed; and

(B) Interest at the rate of 3 percent per year computed as specified by section 8334(e)(2) of title 5, United States Code, until the date the deposit is paid.

(ii) For individuals who will have a CSRS component, the deposit will be computed as specified in 5 CFR 831.306(c).

(i) *Processing applications for pre-1969 National Guard technician service credit for annuitants (and survivors) and for former employees who separated after December 31, 1968, and before November 6, 1990—(1) OPM determines creditable service.* OPM will determine whether all conditions for crediting the additional service have been met, compute the amount of the deposit, and notify the individual.

(2) *Computing the deposit for annuitants and survivors.* (i) For individuals who do not have a CSRS component, the deposit will be computed based on—

(A) One and three tenths percent of basic pay at the time the service was performed; and

(B) Interest at the rate of 3 percent per year as specified by section 8334(e)(2) of title 5, United States Code, to the midpoint of the 24-month installment period, or if paid in a lump sum, the date the deposit is paid.

(ii) For individuals who will have a CSRS component, the deposit will be computed as specified in 5 CFR 831.306(e)(2)(i) and (ii)(A).

(iii)(A) OPM will notify annuitants and survivors of the amount of the deposit and give them a proposed installment schedule for paying the deposit from monthly annuity payments. The proposed installment payments will consist of equal monthly payments that will not exceed a period 24 months from the date a complete written application is received by OPM.

(B) The annuitant or survivor may allow the deposit installments to be deducted from his or her annuity as proposed or make payment in a lump sum within 30 days from the date of the notice.

(C) Increased annuity payments will begin to accrue the first day of the month after OPM receives the complete written application.

(iv) If an annuitant dies before completing the deposit installment payments, the remaining installments will be deducted as established for the annuitant from benefits payable to the survivor annuitant (but not if the only survivor benefit is payable to a child or children of the deceased), if any. If no survivor annuity is payable, OPM may collect the balance of the deposit from any lump sum benefits payable or from the decedent's estate, if any.

(3) *Computing the deposit for former Federal employees separated after December 31, 1968 but before November 6, 1990.* For former employees with title to a deferred annuity that commences after November 6, 1990, the deposit will be computed as provided in paragraph (i)(2) above, except that interest will be computed through the commencing date of annuity or the date the deposit is paid, whichever comes first.

(j) *Certain Government service performed abroad after December 31, 1988, and before May 24, 1998—(1) Eligibility-current and former employees, and retirees.* A current or former employee, or a retiree who performed certain Government service abroad described in § 842.304(e) may make a deposit for such service, in a form prescribed by OPM.

(2) *Eligibility-survivors.* A survivor of a current employee, former employee, or a retiree eligible to make a deposit under paragraph (j)(1) of this section may make a deposit under this section if the current or former employee, or retiree is deceased and the survivor is

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eligible or would be eligible for a survivor annuity under FERS based on the service of the current or former employee, or retiree.

(3) *Filing of deposit application.* An individual eligible to make a deposit under paragraphs (j)(1) and (2) of this section for service described in § 842.304(e) must submit a written application to make a deposit for such service with the appropriate office in the department or agency where such service was performed. If the department or agency where the service was performed no longer exists, the individual must submit the written application to the appropriate office in the Department of State.

(4) *Time limit for filing application.* An application to make a deposit under this section must be submitted on or before August 29, 2008.

(5) *Amount of deposit.* (i) A deposit under this section must be computed using distinct periods of service. For the purpose of this section, a distinct period of service means a period of service not interrupted by a break in service of more than 3 days. A deposit may be made for any or all distinct periods of service.

(ii) The amount of deposit under this section equals the amount of deductions from basic pay that would have been required under section 8422 of title 5, United States Code, if at the time the service was performed the service had been subject to FERS deductions under that section, plus interest.

(6) *Forms of deposit.* A deposit under this section must be made as a single lump sum within 180 days of being notified of the deposit amount.

(7) *Processing deposit applications and payments.* (i) The department or agency where the service described in § 842.304(e) was performed must process the deposit applications and payments under this section. If the department or agency where the service was performed no longer exists, the Department of State must process the deposit applications and payments under this section.

(ii) Whenever requested, the Department of State must assist the department or agency responsible for processing deposit applications under this section determine whether the applica-

tion meets the requirements of § 842.304(e).

(iii) Upon receiving a deposit application under this section, the department or agency must determine whether the application meets the requirements of § 842.304(e); compute the deposit, including interest; and advise the applicant of the total amount of deposit due.

(iv) The department or agency must establish a deposit account showing the total amount due.

(v) When it receives an individual's payment for the service, the department or agency must remit the payment to OPM immediately for deposit to the Civil Service Retirement and Disability Fund in accordance with instructions issued by OPM.

(vi) Once a deposit has been paid in full or otherwise closed out, the department or agency must submit the documentation pertaining to the deposit to OPM in accordance with instructions issued by OPM.

(8) *Government contributions.* (i) The department or agency where service described in § 842.304(e) was performed must pay Government contributions for each period of service covered by a deposit under this section.

(ii) The amount of contributions under this section equals the amount of Government contributions which would have been required for the service under section 8423 of title 5, United States Code, if the service had been covered under chapter 84 of title 5, United States Code, plus interest.

(iii) The department or agency must remit the amount of Government contributions under this section to OPM at the same time it remits the employee deposit for this service to OPM in accordance with instructions issued by OPM.

(9) *Interest.* Interest must be computed as described under paragraphs (2) and (3) of 5 U.S.C. 8334(e). Interest must be computed for each distinct period of service from the midpoint of each distinct period of service. The interest accrues annually on the outstanding deposit and is compounded annually, until the deposit is paid.

(10) *Effect of deposit.* An individual completing a deposit under this section will receive retirement credit for the

service covered by the deposit when OPM receives certification that the deposit has been paid in full, and the deposit payment and agency contributions are remitted to the Civil Service Retirement and Disability Fund.

(11) *Appeal rights.* When the department or agency processing an application for deposit under this section determines that the individual is not eligible to make a deposit for a period of service, it must provide the individual with a written decision explaining the reason for the decision and explaining the individual's right to appeal the decision to the Merit Systems Protection Board.

[52 FR 18193, May 14, 1987, as amended at 56 FR 55597, Oct. 29, 1991; 56 FR 65419, Dec. 17, 1991; 70 FR 50953, Aug. 29, 2005]

#### § 842.306 Military service.

(a) Except as provided in paragraph (b), and unless otherwise provided under title III of the Federal Employees' Retirement System Act of 1986, an employee's or Member's military service is creditable if it was performed—

(1) Before January 1, 1957; or

(2) After December 31, 1956, subject to payment, before separation from service, of the deposit required by § 842.307.

(b) Credit for a period of military service is not allowed if the employee or Member is receiving military retired pay for such period awarded for reasons other than—

(1) Service-connected disability incurred in combat with an enemy of the United States;

(2) Service-connected disability caused by an instrumentality of war and incurred in the line of duty during a period of war (within the meaning of chapter 11 of title 38, United States Code); or

(3) Retirement under chapter 67 of title 10, United States Code.

(c) When adjudicating annuity claims, OPM will accept determinations made by the agency that authorized military retired pay concerning—

(1) The effective date of a waiver of military retired pay;

(2) Whether an individual's military retired pay was awarded for any of the reasons mentioned under paragraph (b) of this section; and

(3) Whether a period of military service forms the basis for military retired pay.

(d)(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, the computation of a survivor's annuity includes credit for any military service allowable under paragraph (a) of this section.

(2) If the separated employee (as defined in § 843.102 of this chapter) was awarded military retired pay, died after the date of separation from civilian service, and did not waive military retired pay effective before the date of death, military service upon which the military retired pay was based is not creditable.

(3) If the survivor of a deceased employee who had been awarded military retired pay files, in a form prescribed by OPM, an election not to have a period of military service included in the computation of survivor benefits, that period of military service is not included in the computation of survivor benefits.

#### § 842.307 Deposits for military service.

(a) *Eligibility to make a deposit.* (1) An employee or Member subject to FERS may make a deposit for any distinct period of military service by filing an application in a form prescribed by OPM.

(2) An application to make a deposit is filed with the appropriate office in the employing agency, or, for Members and Congressional employees, with the Secretary of the Senate, or the Clerk of the House of Representatives, as appropriate.

(3) An employee's or Member's deposit for military service must be completed before separation from service. If a deceased employee or Member was, at the time of death, eligible to make a deposit, the employee's or Member's survivor may make the deposit in one lump sum to the former employing agency, the Secretary of the Senate or the Clerk of the House of Representatives, before OPM completes adjudication of the survivor annuity application. A person who was eligible to make a deposit for military service but failed to complete the deposit within the time limits provided in this paragraph, may complete the deposit in a

lump sum within the time limit set by OPM when it rules that an administrative error has been made.

(b) *Amount of deposit.* (1) The amount of a deposit for military service equals 3 percent of the basic pay for the service under 37 U.S.C. 207, or an estimate of the basic pay (see paragraph (c)(1)(iii) of this section), plus interest, unless interest is not required under paragraph (b)(4) of this section.

(2) Interest is charged at a rate as determined by the Secretary of the Treasury for each calendar year that equals the overall average yield to the Fund during the preceding fiscal year from all obligations purchased by the Secretary during such fiscal year under 5 U.S.C. 8348(c), (d), and (e).

(3) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case; but whenever applicable, the rule of average applies.

(4) Interest is computed from the mid-point of each full period of service included in the computation. The interest accrues annual on the outstanding portion beginning on the second anniversary of the employee's or Member's beginning date of coverage under FERS, and is compounded annually, until the portion is deposited. Interest is charged to the date of deposit. No interest will be charged if the deposit is completed before the end of the year after interest begins. For example, if an employee becomes subject to FERS on March 1, 1988, interest begins to accrue on March 1, 1990; however, no interest would be included in the deposit due if the deposit is completed by February 28, 1991.

(c) *Processing deposit applications and payments.* (1) The agency, Clerk of the House of Representatives, or Secretary of the Senate will have the employee or Member—

(i) Complete an application to make deposit;

(ii) Provided a copy of his or her DD Form 214 or its equivalent to verify the period(s) of service; and

(iii) Provide copies of all official military pay documents, as identified in instructions issued by OPM, which show the exact basic pay he or she received for full period of service; or, if

such evidence is not available, obtain a statement of estimated earnings from the appropriate branch of the military service and submit the statement.

(2) Upon receipt of the application, the DD Form 214, and either the evidence of exact basic pay or the statement of estimated earnings, the agency, Clerk of the House of Representatives, or Secretary of the Senate will establish a deposit account showing—

(i) The total amount due, including interest, if any;

(ii) A payment schedule (unless deposit is made in a lump sum); and

(iii) The date and amount of each payment.

(3) Deposits may be made in a single lump sum or in installments. The agency, Clerk of the House of Representatives, and Secretary of the Senate are not required to accept installment payments in amounts less than \$50.

(4) Payments received by the employing agency, the Clerk of the House of Representatives, or the Secretary of the Senate will be remitted to OPM for deposit to the Fund in accordance with payroll office instructions issued by OPM.

(d) *Distinct periods of service.* A deposit is not considered to have been made for any distinct period of service unless the total amount due for the period is paid in full. A "distinct period" for this purpose is the total years, months, and days from the date of entry on active duty (or from January 1, 1957, if later) to the date of final discharge for enlisted military personnel, or to the date of final release from active duty for officers and reservists. A "distinct period" also includes consecutive periods of service where there is no break in service, but does not include any lost time.

**§ 842.308 Refunds of deductions and service credit deposits made before becoming subject to FERS.**

(a) An employee or Member who, while currently employed, is eligible under 5 U.S.C. 8342(a) for a refund of deductions or deposits (relating to civilian service performed before becoming subject to FERS and totaling less than 5 years, not counting service after 1983 that was covered simultaneously by both CSRS and social security) that

were previously made for a period of service performed before becoming subject to FERS is eligible for a refund, upon proper application in a form prescribed by OPM. The amount of this refund is the difference between—

(1) The amount of deductions and deposits to his or her credit for such service, plus any interest computed in accordance with 5 U.S.C. 8331(8); and

(2) The amount of the deposit required for such service under § 842.305.

(b) A former employee or Member who is eligible under 5 U.S.C. 8342(a) for a refund of deductions or deposits covering civilian service of the types described in paragraph (a) of this section is eligible for a refund, upon proper application in a form prescribed by OPM. The individual may irrevocably elect a refund, with respect to this service, of either—

(1) The amount provided under paragraph (a) of this section; or

(2) The full amount of deductions and deposits to his or her credit for such service, plus any interest computed in accordance with 5 U.S.C. 8331(8). If the full amount of deductions and deposits is elected by the former employee or Member, no future deposit for the service may be made.

(c) An employee or Member, who, before becoming subject to FERS, made a deposit for military service is eligible upon proper application in a form prescribed by OPM, while currently employed, for a refund of the amount deposited, excluding interest, to the extent that this amount exceeds the amount of the deposit required for such service under § 842.307.

(d) A former employee or Member who, before becoming subject to FERS, made a deposit for military service is eligible for a refund, upon proper application in a form prescribed by OPM. The former employee or Member may irrevocably elect to receive either—

(1) The amount provided under paragraph (c) of this section; or

(2) The full amount deposited and remaining to the individual's credit. If the full amount of the deposit is elected, no future deposit for the service may be made.

(e) If the current employing agency holds all necessary records pertaining to the amounts in question under para-

graph (a) or (c) of this section, the current employing agency will pay the refund in accordance with OPM instructions. Otherwise, OPM will pay the refund.

#### § 842.309 Contract service.

Contract service with the United States will only be included in the computation of, or used to establish title to, an annuity under chapter 84 of title 5, United States Code, if—

(a) The employing agency exercised an explicit statutory authority to appoint an individual into the civil service by contract; or

(b) The head of the agency which was party to the contract, based on a timely-filed application, in accordance with section 110 of Public Law 100-238, and the regulations promulgated by OPM pursuant to that statute, certifies that the agency intended that an individual be considered as having been appointed to a position in which (s)he would have been subject to subchapter III of chapter 83 of title 5, United States Code, and deposit has been paid in accordance with OPM's regulations.

[55 FR 53136, Dec. 27, 1990]

#### § 842.310 Service not creditable because of an election under part 847 of this chapter.

Any FERS service which becomes creditable under a retirement system established for nonappropriated fund employees due to an election made under part 847 of this chapter is not creditable for any purpose under FERS.

[61 FR 41721, Aug. 9, 1996]

### Subpart D—Computations

SOURCE: 52 FR 4475, Feb. 11, 1987, unless otherwise noted.

#### § 842.401 Purpose.

This subpart regulates the basic annuity computation under the Federal Employees Retirement System (FERS).

#### § 842.402 Definitions.

In this subpart—

*Full-time service* means any actual service in which the employee is scheduled to work the number of hours and

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days required by the administrative workweek for his or her grade or class (normally 40 hours).

*Part-time service* means any actual service performed on a less than full-time basis, by an individual whose appointment describes a regularly scheduled tour of duty, and any period of time credited as nonpay status time under 5 U.S.C 8411(d), that follows a period of part-time service without any intervening period of actual service other than part-time service.

*Proration factor* means a fraction expressed as a percentage rounded to the nearest percent. The numerator is the sum of the number of hours the employee actually worked during part-time service; and the denominator is the sum of the number of hours that a full-time employee would be scheduled to work during the same period of service included in the numerator. If an employee has creditable service in addition to part-time service, such service must be included in the numerator and denominator of the fraction.

*Total service* means the full years and twelfth parts thereof of an employee's or Member's service creditable under subpart C of this part, excluding any fractional part of a month.

[52 FR 4475, Feb. 11, 1987, as amended at 52 FR 22436, June 12, 1987; 58 FR 43493, Aug. 17, 1993]

### § 842.403 Computation of basic annuity.

(a) Except as provided in paragraph (b) of this section and §§ 842.405 and 842.406, the annuity of an employee or Member is 1 percent of average pay multiplied by total service.

(b) The annuity of an employee is 1.1 percent of average pay multiplied by total service, provided the individual—

(1) Has completed 20 years of service; and

(2) At the time of separation on which entitlement to an annuity is based—

(i) Is at least age 62; and

(ii) Is not a customs and border protection officer, a Member, Congressional employee, military reserve technician, law enforcement officer, fire-

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fighter, nuclear materials courier, or air traffic controller.

[52 FR 4475, Feb. 11, 1987, as amended at 76 FR 42000, July 18, 2011]

### § 842.404 Reductions in basic annuity.

The annuity of an employee or Member retiring under § 842.204(a)(1) or § 842.212(b) is reduced by five-twelfths of 1 percent for each full month by which the commencing date of annuity precedes the 62nd birthday of the employee or Member, unless the individual—

(a) Has completed 30 years of service; or

(b)(1) Has completed 20 years of service; and

(2) Is at least age 60 on the commencing date of annuity; or

(c) Has completed 20 years of service as—

(1) An air traffic controller, except one separated by removal for cause on charges of misconduct or delinquency;

(2) A firefighter and/or law enforcement officer, except one separated by removal for cause on charges of misconduct of delinquency; or

(3) A Member, except one separated by resignation or expulsion.

### § 842.405 Air traffic controllers, firefighters, law enforcement officers, and nuclear materials couriers.

The annuity of an air traffic controller retiring under § 842.207 or a law enforcement officer, firefighter or nuclear materials courier retiring under § 842.208 is—

(a) One and seven-tenths percent of average pay multiplied by 20 years; plus

(b) One percent of average pay multiplied by the years of service exceeding 20 years.

[52 FR 4475, Feb. 11, 1987, as amended at 65 FR 2524, Jan. 18, 2000]

### § 842.406 Members of Congress and Congressional employees.

The annuity of an employee or Member who has had at least 5 years of service as a congressional employee, Member, or any combination thereof totaling 5 years is—

(a) One and seven-tenths percent of average pay multiplied by the total number of years of service as a Member

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and/or congressional employee not exceeding 20 years: plus

(b) One percent of average pay multiplied by the years of service other than that of a Member and/or congressional employee.

### § 842.407 Proration of annuity for part-time service.

The annuity of an employee whose service includes part-time service is computed in accordance with § 842.403, using the average pay based on the annual rate of basic pay for full-time service. This amount is then multiplied by the proration factor. The result is the annual rate of annuity before reductions for retirement before age 62, survivor benefits, or the reduction for an alternative form of annuity required by § 842.706.

[52 FR 22436, June 12, 1987]

## Subpart E—Annuity Supplement

SOURCE: 52 FR 4479, Feb. 11, 1987, unless otherwise noted.

### § 842.501 Purpose.

This subpart regulates the annuity supplement payable to eligible employees under sections 8421 and 8421(a) of title 5, United States Code.

### § 842.502 Definitions.

In this subpart—

*Age 62* means the day before an individual's sixty-second birthday.

*Annuity Supplement* means the monthly benefit described in § 842.504.

*Applicable exempt amount* and *earnings* have the same meanings as in section 203 of the Social Security Act.

*Excess earnings* means 50 percent of an individual's earnings which exceed the applicable exempt amount during a calendar year or, if less, an amount equal to the total annuity supplement paid to the individual in that year, but does not include earnings prior to an individual's attainment of the minimum retirement age.

*FERS* means chapter 84 of title 5, United States Code.

*Minimum retirement age* has the same meaning as in § 842.202.

*Test year* means the calendar year immediately before the one in which any

reductions required by 5 U.S.C. 8421a and § 842.505 are applied.

### § 842.503 Eligibility for annuity supplement.

(a) Except as provided in paragraph (b) of this section, an employee or Member receiving an annuity under any of the following sections is entitled to receive an annuity supplement:

(1) Section 842.204(a)(1) if the employee or Member has completed at least 30 years of service;

(2) Section 842.204(a)(2) governing retirement at age 60 with 20 years of service;

(3) Section 842.205 governing retirement at age 50 with 20 years of service or at any age during a major reorganization or reduction in force;

(4) Section 842.206 governing discontinued service retirement;

(5) Section 842.07 governing early retirement for air traffic controllers;

(6) Section 842.208 governing early retirement for law enforcement officers;

(7) Section 842.209 governing early retirement for Members of Congress;

(8) Section 842.210 governing early retirement for military reserve technicians; or

(9) Section 842.211 governing early retirement for members of the Senior Executive Service.

(b) An employee or Member who retires under any of the following sections before attaining the minimum retirement age is not entitled to receive an annuity supplement until he or she attains that age:

(1) Section 842.205;

(2) Section 842.206;

(3) Section 842.209; or

(4) Section 842.211, except that an individual entitled to an annuity under 5 U.S.C. 8414(a) for failure to be recertified as a senior executive shall be entitled to an annuity supplement without regard to the minimum retirement age.

(c) An employee or Member ceases to be entitled to an annuity supplement on the earlier of—

(1) The last day of the month in which the individual becomes age 62; or

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(2) The last day of the month before the first month for which the individual would, upon proper application, be entitled to social security benefits.

[52 FR 4479, Feb. 11, 1987, as amended at 56 FR 173, Jan. 3, 1991]

**§ 842.504 Amount of annuity supplement.**

(a) Subject to paragraph (b) of this section, an annuity supplement is an amount equal to the old-age insurance benefit payable under title II of the Social Security Act, multiplied by a fraction—

(1) The numerator of which is the annuitant's total service creditable under FERS, excluding military service not performed during an absence of leave without pay from civilian service, rounded to the nearest whole number of years not exceeding 40 years; and

(2) The denominator of which is 40.

(b)(1) The benefit referred to in paragraph (a) of this section is computed—

(i) As if the annuitant were age 62 and fully insured on January 1 of the year the annuity supplement commences;

(ii) Without regard to the Social Security earnings test (section 203 of the Social Security Act);

(iii) Without regard to the Social Security windfall elimination provisions (sections 215(a)(7) and 215(d)(5) of the Social Security Act); and

(iv) Using the actuarial reduction (section 202(q) of the Social Security Act) prescribed in the following table:

| Year of Birth         | Reduction (percent)            |
|-----------------------|--------------------------------|
| 1937 and before ..... | 20                             |
| 1938 .....            | 20 <sup>5</sup> / <sub>6</sub> |
| 1939 .....            | 21 <sup>2</sup> / <sub>3</sub> |
| 1940 .....            | 22 <sup>1</sup> / <sub>2</sub> |
| 1941 .....            | 23 <sup>1</sup> / <sub>3</sub> |
| 1942 .....            | 24 <sup>1</sup> / <sub>6</sub> |
| 1943–54 .....         | 25                             |
| 1955 .....            | 25 <sup>5</sup> / <sub>6</sub> |
| 1956 .....            | 26 <sup>2</sup> / <sub>3</sub> |
| 1957 .....            | 27 <sup>1</sup> / <sub>2</sub> |
| 1958 .....            | 28 <sup>1</sup> / <sub>3</sub> |
| 1959 .....            | 29 <sup>1</sup> / <sub>6</sub> |
| 1960 and later .....  | 30                             |

(2) In computing the primary insurance amount—

(i) The number of elapsed years used to compute the number of benefit computation years does not include the

years beginning with the year in which the annuity supplement commences;

(ii) For an employee or Member who retires under §§ 842.205, 842.206, 842.209, or 842.211 before reaching the minimum retirement age, wages in calendar years beginning after the date of separation on which the retirement is based, are deemed to be zero.

(iii) Only basic pay for full calendar years of service creditable under FERS is taken into account in computing the retiree's wages for a benefit computation year;

(iv) For a benefit computation year after age 21 during which the retiree did not perform a full calendar year of service creditable under FERS the retiree's wages are deemed to equal the product of—

(A) The National Average Wage Index (as determined by the Commissioner of the Social Security Administration) corresponding to that year, multiplied by

(B) A fraction—

(1) The numerator of which is the retiree's basic pay for his or her first full year of service creditable under FERS; and

(2) The denominator of which is the National Average Wage Index (as determined by the Commissioner of the Social Security Administration) corresponding to the retiree's first full year of service creditable under FERS.

[52 FR 4479, Feb. 11, 1987, as amended at 69 FR 69806, Dec. 1, 2004]

**§ 842.505 Reduction in annuity supplement because of excess earnings.**

(a)(1) Except as provided in paragraphs (a)(2) and (b) of this section, the annuity supplement payable under § 842.504 is reduced by excess earnings in the test year, divided by twelve.

(2) Any annuity supplement payable during the year in which an individual loses entitlement to the annuity supplement by reason of § 842.503(c) is reduced by excess earnings in the test year divided by the number of months for which the annuity supplement is payable.

(b) Any reduction in the annuity supplement during a month because of excess earnings may not exceed the amount of annuity supplement payable during that month.

(c) Earnings and estimated earnings for each test year will be furnished by retirees in a form prescribed by OPM.

(d) Failure to furnish earnings and estimated earnings in the form or at the times prescribed by OPM is cause to suspend payment of the supplement until the annuitant establishes to the satisfaction of OPM that he/she continues to be eligible for the supplement.

(e) The reductions described in paragraphs (a) and (b) of this section are not subject to the due process procedures described in 5 U.S.C. 8461(e).

### Subpart F—Survivor Elections

SOURCE: 52 FR 2061, Jan. 16, 1987, unless otherwise noted.

#### § 842.601 Purpose.

This subpart explains the survivor annuity elections available under FERS for retirees, and retiring employees and Members, and the actions that they must take to provide these survivor annuities.

#### § 842.602 Definitions.

In this subpart—

*Current spouse* means a living person who is married to the employee, Member, or retiree at the time of the employee's, Member's, or retiree's death.

*Current spouse annuity* means a recurring benefit under FERS that is payable (after the employee's, Member's or retiree's death) to a current spouse who meets the requirements of § 843.303 of this chapter.

*Deposit* means a deposit required to provide a survivor benefit. *Deposit*, as used in this subpart, does not include a service credit deposit or redeposit.

*FERS* means chapter 84 of title 5, United States Code.

*First regular monthly payment* means the first annuity check payable on a recurring basis (other than an estimated payment or an adjustment check) after OPM has initially adjudicated the regular rate of annuity payable under FERS and has paid the annuity accrued since the time of retirement. The *first regular monthly payment* is generally preceded by estimated payments before the claim can be adjudicated and by an adjustment

check (including the difference between the estimated rate and the initially adjudicated rate).

*Former spouse* means a living person who was married for at least 9 months to an employee, Member, or retiree who performed at least 18 months of creditable service under FERS. The "former spouse's" marriage to the employee must have been terminated prior to the death of the employee, Member, or retiree.

*Former spouse annuity* means a recurring benefit under FERS that is payable to a former spouse after the employee's, Member's, or retiree's death.

*Fully reduced annuity* means the recurring payments under FERS received by a retiree who has elected the maximum reduction in his or her annuity to provide a current spouse annuity and/or a former spouse annuity or annuities.

*Insurable interest rate* means the recurring payments under FERS to a retiree who has elected a reduction in annuity to provide a survivor annuity to a person with an insurable interest in the retiree.

*Marriage* has the same meaning as in § 843.102 of this chapter.

*Member* means a Member of Congress.

*Net annuity* means the net annuity as defined in § 838.103 of this chapter.

*One-half reduced annuity* means the recurring payments under FERS received by a retiree who has elected one-half of the full reduction in his or her annuity to provide a partial current spouse annuity or a partial former spouse annuity or annuities.

*Present value factor* means the amount of money (earning interest at an assumed rate) required at the time of retirement to fund an annuity that starts out at the rate of \$1 a month and is payable in monthly installments for the annuitant's lifetime based on mortality rates for non-disability annuitants under the Civil Service Retirement System; and increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries of the Civil Service Retirement System for valuation of the System, based on dynamic assumptions. The present

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value factors are unisex factors obtained by averaging six distinct present value factors, weighted by the total dollar value of annuities typically paid to new retirees at each age.

*Qualifying court order* means a court order that awards a former spouse annuity and that satisfies the requirements of section 8445 of title 5, United States Code, for awarding a former spouse annuity.

*Retiree* means a former employee or Member who is receiving recurring payments under FERS based on service by the employee or Member. “Retiree,” as used in this subpart, does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity.

*Self-only annuity* means the recurring unreduced payments under FERS to a retiree with no survivor annuity payable to anyone.

*Time of retirement* means the effective commencing date for retired employee’s or Member’s annuity. An employee or Member is unmarried at the time of retirement for all purposes under this subpart only if the employee or Member was unmarried on the date that the annuity begins to accrue.

[52 FR 2061, Jan. 16, 1987, as amended at 56 FR 65419, Dec. 17, 1991; 57 FR 33598, July 29, 1992; 57 FR 54678, Nov. 20, 1992; 58 FR 52883, Oct. 13, 1993]

**§ 842.603 Election at time of retirement of a fully reduced annuity to provide a current spouse annuity.**

(a) A married employee or Member retiring under FERS will receive a fully reduced annuity to provide a current spouse annuity unless—

(1) The employee or Member, with the consent of the current spouse, elects a self-only annuity, a one-half reduced annuity to provide a current spouse annuity, or a fully reduced annuity to provide a former spouse annuity, in accordance with § 842.604 or § 842.606; or

(2) The employee or Member elects a self-only annuity or a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity, and current spousal consent is waived in accordance with § 842.607.

(b) Qualifying court orders that award former spouse annuities prevent

payment of current spouse annuities to the extent necessary to comply with the court order and § 842.613.

(c) The amount of the reduction to provide a current spouse annuity under this section is 10 percent of the retiree’s annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54678, Nov. 20, 1992]

**§ 842.604 Election at time of retirement of a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity.**

(a) An unmarried employee or Member retiring under FERS may elect a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity or annuities.

(b) A married employee or Member retiring under FERS may elect a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity, if the current spouse consents to the election in accordance with § 842.606 or spousal consent is waived in accordance with § 842.607.

(c) An election under paragraph (a) or (b) of this section is void to the extent that it—

(1) Conflicts with a qualifying court order; or

(2) Would cause the total of current spouse annuities and former spouse annuities payable based on the employee’s or Member’s service to exceed the maximum amount of survivor annuity that the employee or Member is entitled to provide under § 842.613.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse remarries before age 55 or dies, or the former spouse’s eligibility for a former spouse annuity terminates under the terms of a qualifying court order, unless—

(1) The retiree elects, within 2 years after the former spouse’s death or remarriage, to continue the reduction to provide a former spouse annuity for another former spouse, or to provide a current spouse annuity; or

(2) A qualifying court order requires the retiree to provide another former spouse annuity.

(e) Except as provided in § 842.614, the amount of the reduction to provide a former spouse annuity equals—

(1) Ten percent of the employee's or Member's annuity if the employee or Member elects a fully reduced annuity; or

(2) Five percent of the employee's or Member's annuity if the employee or Member elects a one-half reduced annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54678, Nov. 20, 1992]

**§ 842.605 Election of insurable interest rate.**

(a) At the time of retirement, an employee or Member in good health and who is applying for a non-disability annuity may elect an insurable interest rate. An election under this section does not exempt a married employee or Member from the provisions of § 842.603(a).

(b) An insurable interest rate may be elected by an employee or Member electing a fully reduced annuity or a one-half reduced annuity to provide a current spouse annuity or a former spouse annuity or annuities.

(c)(1) In the case of a married employee or Member, an election under this section may not be made on behalf of a current spouse unless that current spouse has consented to an election not to provide a current spouse annuity in accordance with § 842.603(a)(1).

(2) A consent (to an election not to provide a current spouse annuity in accordance with § 842.603(a)(1)) required by paragraph (c)(1) of this section to be eligible to be the beneficiary of an insurable interest rate is cancelled if—

(i) The retiree fails to qualify to receive the insurable interest rate; or

(ii) The retiree changes his or her election to receive an insurable interest rate under § 842.608; or

(iii) The retiree elects a fully reduced annuity to provide a current spouse annuity under § 842.610.

(3) An election of a one-half reduced annuity under § 842.610(b) to provide a current spouse annuity for a current spouse who is the beneficiary of an insurable interest rate is void unless the spouse consents to the election.

(4) If a retiree who had elected an insurable interest rate to benefit a cur-

rent spouse elects a fully reduced annuity to provide a current spouse annuity (or with the consent of the spouse, a one-half reduced annuity to provide a current spouse annuity) under § 842.610(b), the election of the insurable interest rate is cancelled.

(5)(i) A retiring employee or Member may not elect a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity and an insurable interest rate to benefit the same former spouse.

(ii) If a retiring employee or Member who is required by court order to provide a former spouse annuity elects an insurable interest rate to benefit the former spouse with the court-ordered entitlement—

(A) If the benefit based on the election is greater than or equal to the benefit based on the court order, the election of the insurable interest rate will satisfy the requirements of the court order as long as the insurable interest rate continues.

(B) If the benefit based on the election is less than the benefit based on the court order, the election of the insurable interest rate is void.

(iii) An election under § 842.611 of a fully reduced annuity or a one-half reduced annuity to benefit a former spouse by a retiree who elected and continues to receive an insurable interest rate to benefit that former spouse is void.

(d) To elect an insurable interest rate, an employee or Member must indicate the intention to make the election on the application for retirement and must submit a certificate of good health in a form prescribed by OPM.

(e) An insurable interest rate may be elected to provide a survivor benefit only for a person who has an insurable interest in the retiring employee or Member.

(1) An insurable interest is presumed to exist with—

(i) The current spouse;

(ii) The same-sex domestic partner;

(iii) A blood or adopted relative closer than first cousins;

(iv) A former spouse;

(v) A former same-sex domestic partner;

(vi) A person to whom the employee or Member is engaged to be married, or

a person with whom the employee or Member has agreed to enter into a same-sex domestic partnership;

(vii) A person with whom the employee or Member is living in a relationship that would constitute a common-law marriage in jurisdictions recognizing common-law marriages;

(2) For purposes of this section, the term “same-sex domestic partner” means a person in a domestic partnership with an employee or annuitant of the same sex, and the term “domestic partnership” is defined as a committed relationship between two adults, of the same sex, in which the partners—

(i) Are each other’s sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to contract;

(iv) Share responsibility for a significant measure of each other’s financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not the domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed; and

(viii) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, shall be determined by the agency.

(3) When an insurable interest is not presumed, the employee or Member must submit affidavits from one or more persons with personal knowledge of the named beneficiary’s having an insurable interest in the employee or

Member. The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member.

(4) The employee or Member may be required to submit documentary evidence to establish the named beneficiary’s date of birth.

(f) OPM will notify the employee or Member of initial monthly annuity rates with and without the election of an insurable interest rate and the initial rate payable to the named beneficiary. No election of an insurable interest rate is effective unless the employee or Member confirms the election in writing or dies no later than 60 days after the date of the notice described in this paragraph.

(g)(1) When an employee or Member elects both an insurable interest rate, and a fully reduced annuity or a one-half reduced annuity, the combined reduction may exceed the maximum 40 percent reduction in the retired employee’s or Member’s annuity permitted under section 8420 of title 5, United States Code, applicable to insurable interest annuities.

(2) The additional reduction to provide a current spouse annuity or a former spouse annuity is not considered in determining the rate of annuity payable to a beneficiary of an insurable interest election.

(h)(1) Except as provided in § 842.604(d), if a retiree who is receiving a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity has also elected an insurable interest rate to benefit a current spouse and if the eligible former spouse remarries before age 55, dies, or loses eligibility under the terms of the court order, and no other former spouse is entitled to a survivor annuity based on an election made in accordance with § 842.611 or a qualifying court order, the retiree may elect, within 2 years after the former spouse’s remarriage, death, or loss of eligibility under the terms of the court order, to convert the insurable interest rate to a fully

reduced annuity to provide a current spouse annuity, effective on the first day of the month following the event causing the former spouse to lose eligibility.

(2) An election under paragraph (h)(1) of this section cancels any consent not to receive a current spouse annuity required by paragraph (c) of this section for the current spouse to be eligible for an annuity under this section.

(3) When a former spouse receiving an annuity under section 8445 of title 5, United States Code, loses eligibility to that annuity, a beneficiary of an insurable interest rate who was the current spouse at both the time of the retiree's retirement and death may, within 2 years after the former spouse's death, remarriage, or loss of eligibility under the terms of the court order, elect to receive a current spouse annuity instead of the annuity he or she had been receiving.

The election is effective on the first day of the month following the event causing the former spouse to lose eligibility.

(i) Upon the death of the current spouse, a retiree whose annuity is reduced to provide both a current spouse annuity and an insurable interest benefit for a former spouse is not permitted to convert the insurable interest rate to a reduced annuity to provide a former spouse annuity.

(j) An employee or Member may name only one natural person as the named beneficiary of an insurable interest rate. OPM will not accept the designation of contingent beneficiaries and such a designation is void.

(k)(1) An election under this section is prospectively voided by an election of a fully reduced annuity to provide a current spouse annuity under § 842.612 that would benefit the same person.

(2)(i) If the current spouse is not the beneficiary of the election under this section, a retiree may prospectively void an election under this section at the time the retiree elects a reduced annuity to provide a current spouse annuity under § 842.612.

(ii) A retiree's election to void an election under paragraph (k)(2)(i) of this section must be filed at the same time as the election under § 842.612.

(3) An annuity reduction under this section terminates on the first day of the month after the beneficiary of the insurable interest rate dies.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54679, Nov. 20, 1992; 77 FR 42912, July 20, 2012]

**§ 842.606 Election of a self-only annuity or a one-half reduced annuity by married employees and Members.**

(a) A married employee may not elect a self-only annuity or a one-half reduced annuity to provide a current spouse annuity without the consent of the current spouse or a waiver of spousal consent by OPM in accordance with § 842.607.

(b) Evidence of spousal consent or a request for waiver of spousal consent must be filed on a form prescribed by OPM.

(c) The spousal consent form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(d) The form described in paragraph (c) of this section may be executed before a notary public, an official authorized by the law of the jurisdiction where executed to administer oaths, or an OPM employee designated for that purpose by the Associate Director.

(e) A request for waiver of the spousal consent requirement must be by letter and fully state the basis for the request.

(f) The amount of the reduction in the retiree's annuity for a one-half reduced annuity to provide a current spouse annuity is 5 percent of the retiree's annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54679, Nov. 20, 1992]

**§ 842.607 Waiver of spousal consent requirement.**

(a) The spousal consent requirement will be waived upon a showing that the spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

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(1) A judicial determination that the spouse's whereabouts cannot be determined; or

(2)(i) Affidavits by the employee or Member and two other persons, at least one of whom is not related to the employee or Member, attesting to the inability to locate the current spouse and stating the efforts made to locate the spouse; and

(ii) Documentary corroboration such as tax returns filed separately or newspaper stories about the spouse's disappearance.

(b) The spousal consent requirement will be waived based on exceptional circumstances if the employee or Member presents a judicial determination finding that—

(1) The case before the court involves a Federal employee who is in the process of retiring from Federal employment and the spouse of that employee;

(2) The nonemployee spouse has been given notice and an opportunity to be heard concerning this order;

(3) The court has considered sections 8416(a) of title 5, United States Code, and this section as they relate to waiver of the spousal consent requirement for a married Federal employee to elect an annuity without a reduction to provide a survivor benefit to a spouse at retirement; and

(4) The court finds that exceptional circumstances exist justifying waiver of the nonemployee spouse's consent.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54679, Nov. 20, 1992]

**§ 842.608 Changes of election before final adjudication.**

An employee or Member may name a new survivor or change his or her election of type of annuity if, not later than 30 days after the date of the first regular monthly payment, the named survivor dies or the employee or Member files with OPM a new written election. All required evidence of spousal consent or justification for waiver of spousal consent, if applicable, must accompany any new written election under this section.

[56 FR 65419, Dec. 17, 1991]

**§ 842.609 [Reserved]**

**§ 842.610 Changes of election after final adjudication.**

(a) Except as provided in § 842.611, § 842.612, or paragraph (b) of this section, an employee or Member may not revoke or change the election or name another survivor later than 30 days after the date of the first regular monthly payment.

(b)(1) Except as provided in § 842.605 and paragraphs (b)(2) and (b)(3) of this section, a retiree who was married at the time of retirement and has elected a self-only annuity, a one-half reduced annuity to provide a current spouse annuity, a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity, or an insurable interest rate may elect, no later than 18 months after the time of retirement, an annuity reduction or an increased annuity reduction to provide a current spouse annuity.

(2) A current spouse annuity based on an election under paragraph (b)(1) of this section cannot be paid if it will, when combined with any former spouse annuity or annuities that are required by court order, exceed the maximum survivor annuity permitted under § 842.613.

(3) To make an election under paragraph (b)(1) of this section, the retiree must pay, in full no later than 18 months after the time of retirement, a deposit equal to the sum of the monthly differences between the annuity paid to the retiree and the annuity that would have been paid if the additional annuity reduction elected under paragraph (b)(1) of this section had been in effect since the time of retirement, plus—

(i) If the election under paragraph (b)(1) of this section changes the annuity from a self only annuity to a fully reduced annuity, 24.5 percent of the retiree's annual annuity, plus 6 percent interest on both; or

(ii) If the election under paragraph (b)(1) of this section changes the annuity from a self only annuity to a one-half reduced annuity or from a one-half reduced annuity to a fully reduced annuity, 12.25 percent of the retiree's annual annuity, plus 6 percent interest on both.

(4) If a retiree makes an election under paragraph (b)(1) of this section and is prevented from paying the deposit within the 18-month time limit because OPM did not send him or her a notice of the amount of the deposit at least 30 days before the time limit expires, the time limit for making the deposit will be extended 30 days after OPM sends the notice of the amount of the deposit.

(5) An election under paragraph (b)(1) of this section cancels any spousal consent under § 842.603.

(6) An election under paragraph (b)(1) of this section is void unless filed with OPM before the retiree dies.

(7) If a retiree who had elected a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity (or annuities) makes an election under paragraph (b)(1) of this section which would cause the combined current spouse annuity and former spouse annuity (or annuities) to exceed the maximum allowed under § 842.613, the former spouse annuity (or annuities) must be reduced to not exceed the maximum allowable under § 842.613.

[52 FR 2061, Jan. 16, 1987, as amended at 56 FR 65419, Dec. 17, 1991; 57 FR 54680, Nov. 20, 1992]

**§ 842.611 Post-retirement election of a fully reduced annuity or one-half reduced annuity to provide a former spouse annuity.**

(a) Except as provided in paragraphs (b) and (c) of this section, when a retiree's marriage terminates after retirement, the retiree may elect in writing a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

(b)(1) Qualifying court orders prevent payment of former spouse annuities to the extent necessary to comply with the court order and § 842.613.

(2) A retiree who elects a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity may not elect to provide a former spouse annuity in an amount that either—

(i) Is smaller than the amount required by a qualifying court order; or

(ii) Would cause the sum of all current and former spouse annuities based on a retiree's elections under §§ 842.603, 842.604, 842.612 and this section to exceed the maximum allowed under § 842.613.

(3) An election under this section is void—

(i) In the case of a married retiree, if the current spouse does not consent to the election on a form as described in § 842.606(c) and spousal consent is not waived by OPM in accordance with § 842.607; or

(ii) To the extent that it provides a former spouse annuity for the spouse who was married to the retiree at the time of retirement in an amount that is inconsistent with any joint designation or waiver made at the time of retirement under § 842.603(a)(1) or (a)(2).

(c) An election under this section is not permitted unless the retiree agrees to deposit the amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraph (a) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest (computed under § 841.107 of this chapter) from the date when each difference occurred.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse remarries before age 55 or dies, or the former spouse's eligibility for a former spouse annuity terminates under the terms of a qualifying court order, unless—

(1) The retiree elects, within 2 years after the event causing the former spouse to lose eligibility, to continue the reduction to provide or increase a former spouse annuity for another former spouse, or to provide or increase a current spouse annuity; or

(2) A qualifying court order requires the retiree to provide another former spouse annuity.

(e) The amount of the reduction to provide one or more former spouse annuities or a combination of a current spouse annuity and one or more former spouse annuities under this section equals—

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(1) Ten percent of the employee's or Member's annuity if the employee or Member elects a fully reduced annuity; or

(2) Five percent of the employee's or Member's annuity if the employee or Member elects a one-half reduced annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54680, Nov. 20, 1992]

**§ 842.612 Post-retirement election of a fully reduced annuity or one-half reduced annuity to provide a current spouse annuity.**

(a) Except as provided in paragraph (c) of this section, a retiree who was unmarried at the time of retirement may elect, within 2 years after a post-retirement marriage, a fully reduced annuity or a one-half reduced annuity to provide a current spouse annuity.

(b) Except as provided in paragraph (c) of this section, a retiree who was married at the time of retirement may elect, within 2 years after a post-retirement marriage—

(1) A fully reduced annuity or a one-half reduced annuity to provide a current spouse annuity if—

(i) The retiree was awarded a fully reduced annuity under § 842.603 at the time of retirement; or

(ii) The election at the time of retirement was made with a waiver of spousal consent in accordance with § 842.607; or

(iii) The marriage at the time of retirement was to a person other than the spouse who would receive a current spouse annuity based on the post-retirement election; or

(2) A one-half reduced annuity to provide a current spouse annuity if—

(i) The retiree elected a one-half reduced annuity under § 842.606 at the time of retirement;

(ii) The election at the time of retirement was made with spousal consent in accordance with § 842.606; and

(iii) The marriage at the time of retirement was to the same person who would receive a current spouse annuity based on the post-retirement election.

(c)(1) Qualifying court orders prevent payment of current spouse annuities to the extent necessary to comply with the court order and § 842.613.

(2) If an election under this section causes the total of all current and former spouse annuities provided by a qualifying court order or elected under § 842.604, § 842.611, or this section to exceed the maximum survivor annuity permitted under § 842.613, OPM will accept the election but will pay the portion in excess of the maximum only when permitted by § 842.613(c).

(d)(1) Except as provided in paragraph (d)(2) or (e)(3) of this section, a retiree making an election under this section must deposit an amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraphs (a) or (b) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest, computed under § 841.606 of this chapter, from the date when each difference occurred.

(2) An election under this section may be made without deposit, if that election prospectively voids an election of an insurable interest annuity.

(e)(1) An election under this section is irrevocable when received by OPM.

(2) An election under this section is effective when the marriage duration requirements of § 843.303 of this chapter are satisfied.

(3) If an election under paragraph (a) or (b) of this section does not become effective, no deposit under paragraph (d) of this section is required.

(4) If payment of the deposit under paragraph (d) of this section is not required because the election never became effective and if some or all of the deposit has been paid, the amount paid will be returned to the retiree, or, if the retiree has died, to the person who would be entitled to any lump-sum benefits under the order of precedence in section 8424 of title 5, United States Code.

(f) Any reduction in an annuity to provide a current spouse annuity will terminate effective on the first day of the month after the marriage to the current spouse ends, unless—

(1) The retiree elects, within 2 years after a divorce terminates the marriage, to continue the reduction to provide for a former spouse annuity; or

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(2) A qualifying court order requires the retiree to provide a former spouse annuity.

(g) The amount of the reduction to provide a current spouse annuity under this section equals—

(1) Ten percent of the employee's or Member's annuity if the employee or Member elects a fully reduced annuity; or

(2) Five percent of the employee's or Member's annuity if the employee or Member elects a one-half reduced annuity.

(h) If a retiree who is receiving a reduced annuity to provide a former spouse annuity and who has remarried that former spouse (before the former spouse attained age 55) dies, the retiree will be deemed to have elected to continue the reduction to provide a current spouse annuity unless the retiree requests (or has requested) in writing that OPM terminate the reduction.

[57 FR 54680, Nov. 20, 1992, as amended at 60 FR 14202, Mar. 16, 1995]

### § 842.613 Division of a survivor annuity.

(a) The maximum combined total of all current and former spouse annuities (not including any benefits based on an election of an insurable interest rate) payable based on the service of a former employee or Member equals 50 percent of the rate of the self-only annuity that otherwise would have been paid to the employee, Member, or retiree.

(b) By using the elections available under this subpart or to comply with a court order under subpart I of part 841 of this chapter, a survivor annuity may be divided into a combination of former spouse annuities and a current spouse annuity so long as the aggregate total of the current and former spouse annuities does not exceed the maximum limitation in paragraph (a) of this section.

(c) Upon termination of former spouse annuity payments because of death or remarriage of the former spouse, or by operation of a court order, the current spouse will be entitled to a current spouse annuity or an increased current spouse annuity if—

(1) The employee or Member died while employed in a position covered under FERS; or

(2) The current spouse was married to the employee or Member continuously from the time of retirement and did not consent to an election not to provide a current spouse annuity; or

(3) The current spouse married a retiree after retirement and the retiree elected, under § 842.612, to provide a current spouse annuity for that spouse in the event that the former spouse annuity payments terminate.

### § 842.614 Computation of partial annuity reduction.

If a court order or the death of a current or former spouse results in providing less than the maximum permitted survivor reduction under § 842.613, the reduction in the employee's annuity will be 10 percent of the amount of the employee's annuity on which the survivor benefits will be computed (called the "base").

### § 842.615 Deposits required.

(a) The deposits required to elect reduced annuities under §§ 842.610, 842.611, and 842.612 are not annuity overpayments and their collection is not subject to waiver.

(b) *Actuarial reduction in annuity of retirees who make post-retirement elections to provide a current spouse annuity or a former spouse annuity.* (1) The annuity reduction required by paragraph (b)(2) of this section applies to all retirees who are required to pay deposits under § 842.611 or § 842.612 and have not paid any portion of the deposit prior to October 1, 1993, or from annuity accruing before that date.

(2) Retirees described in paragraph (b)(1) of this section must have a permanent annuity reduction computed under paragraph (b)(4) of this section.

(3) A reduction under paragraph (b)(2) of this section commences on the same date as the annuity reduction under § 842.611 or § 842.612.

(4) The annuity reduction under paragraph (b)(2) of this section is equal to the lesser of—

(i) The amount of the deposit under § 842.611 or § 842.612 divided by the present value factor for the retiree's

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age on the commencing date of the reduction under paragraph (b)(3) of this section (plus any previous reduction(s) in the retiree's annuity required under paragraph (b)(2) or (c)(2) of this section); or

(ii) Twenty-five percent of the rate of the retiree's self-only annuity on the commencing date of the reduction (under paragraph (b)(3) of this section).

(5)(i) The reduction under paragraph (b)(2) or paragraph (c)(2) of this section terminates on the date that the retiree dies.

(ii) If payment of a retiree's annuity is suspended or terminated and later reinstated, or if a new annuity becomes payable, OPM will increase the amount of the original reduction computed under paragraph (b)(4) or paragraph (c)(4) of this section by any cost-of-living adjustments under section 8462 of title 5, United States Code, occurring between the commencing date of the original reduction and the commencing date of the reinstated or new annuity (but the adjusted reduction may not exceed 25 percent of the rate of the reinstated or new self-only annuity).

(c) *Post-retirement survivor election deposits that were partially paid before October 1, 1993.* (1) The annuity reduction required by paragraph (c)(2) of this section applies to all retirees who are required to pay deposits under § 842.611 or § 842.612 and have paid any portion (but not all) of the deposit prior to October 1, 1993, or from annuity accruing before that date.

(2) Retirees described in paragraph (c)(1) of this section must have a permanent annuity reduction computed under paragraph (c)(4) of this section.

(3) A reduction under paragraph (c)(2) of this section commences on October 1, 1993.

(4) The annuity reduction under paragraph (c)(2) of this section is equal to the lesser of—

(i) The amount of the principal balance remaining to be paid on October 1, 1993, divided by the present value factor for the retiree's age on October 1, 1993; or

(ii) Twenty-five percent of the rate of the retiree's self-only annuity on October 1, 1993.

(5)(i) The reduction under paragraph (c)(2) of this section terminates on the date that the retiree dies.

(ii) If payment of a retiree's annuity is suspended or terminated and later reinstated, or if a new annuity becomes payable, OPM will increase the amount of the original reduction computed under paragraph (b)(4) or paragraph (c)(4) of this section by any cost-of-living adjustments under section 8462 of title 5, United States Code, occurring between the commencing date of the original reduction and the commencing date of the reinstated or new annuity (but the adjusted reduction may not exceed 25 percent of the rate of the reinstated or new self-only annuity).

(d) For retirees who die before October 1, 1993, any unpaid portion of the deposit required under § 842.611 or § 842.612 will be collected from the survivor annuity (for which the election required the deposit) before OPM pays any survivor annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 58 FR 52883, Oct. 13, 1993]

### Subpart G—Alternative Forms of Annuities

SOURCE: 52 FR 2067, Jan. 16, 1987, unless otherwise noted.

#### § 842.701 Purpose.

This subpart explains the benefits available to employees and Members who elect alternative forms of annuity under section 8420a of title 5, United States Code.

#### § 842.702 Definitions.

In this subpart—

*Alternative form of annuity* means the benefit elected under § 842.705.

*Current spouse annuity* has the same meaning as in § 842.602.

*Date of final adjudication* means the date 30 days after the date of the first regular monthly payment as defined in § 831.603.

*Former spouse annuity* has the same meaning as in § 842.602.

*Present value factor* represents the amount of money (earning interest at an assumed rate) required at the time of retirement to fund an annuity that (a) starts out at the rate of \$1 a month

and is payable in monthly installments for the annuitant's lifetime based on mortality rates for non-disability annuitants; and (b) increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries for valuation of the System, based on dynamic assumptions. The present value factors are unisex factors obtained by averaging sex-distinct present value factors, weighted by the total dollar value of annuities typically paid to new retirees at each age.

*Time of retirement* has the same meaning as in § 842.602.

[52 FR 2067, Jan. 16, 1987, as amended at 53 FR 11635, Apr. 8, 1988]

#### § 842.703 Eligibility.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, an employee or Member who retires under any provision of subchapter II of chapter 84 of title 5, United States Code, may elect an alternative form of annuity instead of any other benefits under the subchapter.

(b) An employee or Member who, at the time of retirement has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a court order acceptable for processing as defined by § 838.103 of this chapter or a qualifying court order as defined in § 838.1003 of this chapter may not elect an alternative form of annuity.

(c) An employee or Member who is married at the time of retirement may not elect an alternative form of annuity unless the employee's or Member's spouse specifically consents to the election. OPM may waive spousal consent only under the conditions prescribed by § 842.607.

(d)(1)(i) An individual whose annuity commences after December 1, 1990, and before October 1, 1994, may elect an alternative form of annuity only if that individual is—

(A) An employee or Member who meets the conditions and fulfills the requirements described in § 842.707(c) (2) and (3); or

(B) An employee who is separated involuntarily other than for cause on charges of misconduct or delinquency;

(ii) An individual whose annuity commences on or after October 1, 1994, may elect an alternative form of annuity only if that individual is an employee or Member who meets the conditions and fulfills the requirements described in § 842.707(c) (2) and (3).

(2) For the purpose of paragraph (d)(1)(i)(B) of this section, the term "employee" does not include—

(i) Members of Congress;

(ii) Individuals in positions in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code;

(iii) Presidential appointees under section 105(a)(1), 106(a)(1), or 107 (a)(1) or (b)(1) of title 3, United States Code, if the maximum basic pay for such positions is at or above the rate for Executive Schedule, level V;

(iv) Noncareer appointees in the Senior Executive Service or noncareer members of the Senior Foreign Service; and

(v) Any individual in a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.

(3) Notwithstanding paragraph (d)(1) of this section, an employee whose annuity commences after December 1, 1990, and before December 2, 1991, may elect an alternative form of annuity if that individual—

(i)(A) Was ordered to active military duty (other than for training) before December 1, 1990, in connection with Operation Desert Shield; or

(B) Is an employee of the Department of Defense who is certified by the Secretary of Defense to have performed, after November 30, 1990, duties essential to support Operation Desert Shield, and the certification is submitted to OPM in a form prescribed by OPM; and

(ii) Would have been eligible, as of November 30, 1990, to elect an alternative form of annuity under paragraph (a) of this section.

[52 FR 2067, Jan. 16, 1987, as amended at 56 FR 6551, Feb. 19, 1991; 56 FR 43866, Sept. 5, 1991; 57 FR 33598, July 29, 1992; 60 FR 54587, Oct. 25, 1995]

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### § 842.704 Election requirements.

(a) The election of an alternative form of annuity and evidence of spousal consent must be filed on a form prescribed by OPM within the time limit prescribed in paragraph (b)(2) of this section. The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent to the specific election as executed by the retiree, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(b) An election of the alternative form of annuity must be in writing and received by OPM on or before the date of final adjudication. After the date of final adjudication, an election of the alternative form of annuity is irrevocable.

(c) Except as provided in paragraph (d), an annuitant who dies before the time limit prescribed in paragraph (b)(2) of this section is deemed to have made an affirmative election under § 842.703(a) with a reduced annuity to provide a current spouse annuity, regardless of any election completed under § 842.606, and the lump-sum credit will be paid in accordance with the order of precedence described in section 8424 of title 5, United States Code.

(d) If an annuitant described in paragraph (c) has completed an election under § 842.604 (a) or (b)—

(1) The lump-sum credit will be paid in accordance with the order of precedence described in section 8424 of title 5, United States Code; and

(2) The election under § 842.604 (a) or (b) will be honored.

[53 FR 11635, Apr. 8, 1988, as amended at 56 FR 6552, Feb. 19, 1991; 60 FR 54587, Oct. 25, 1995]

### § 842.705 Alternative forms of annuities available.

(a) An employee or Member who is eligible to make an election under § 842.703 may elect to receive his or her lump-sum credit, excluding interest, plus an annuity computed in accordance with sections 8415 and 8421 of title 5, United States Code, for which they qualify (including any reduction for

survivor benefits) and reduced under § 842.706.

(b) A retired employee or Member who elected an alternative form of annuity is subject to all provisions of subchapters II and IV of chapter 84 of title 5, United States Code, as would otherwise apply to a retired employee or Member who did not elect an alternative form of annuity. An individual who has elected an alternative form of annuity is not eligible to apply for disability annuity under subchapter V of such chapter.

[52 FR 2067, Jan. 16, 1987, as amended at 53 FR 11635, Apr. 8, 1988]

### § 842.706 Computation of alternative form of annuity.

(a) To compute the beginning rate of annuity payable to a retiree who elects an alternative form of annuity, OPM will first compute the monthly rate of annuity (and annuity supplement, if any), otherwise payable under subchapter II of chapter 84 of title 5, United States Code, including all reductions provided under the subchapter other than those in section 8420a of that title. That monthly rate is then reduced by an amount equal to the retiree's lump-sum credit, excluding interest, divided by the applicable present value factor for the retiree's attained age (in full years) at the time of retirement. The reduced monthly rate is then rounded to the next lowest dollar and becomes the rate of annuity payable.

(b) OPM will publish a notice in the FEDERAL REGISTER announcing any proposed adjustments in present value factors at least 30 days before the effective date of the adjustments.

### § 842.707 Partial deferred payment of the lump-sum credit if annuity commences after January 3, 1988, and before October 1, 1989.

(a) Except as provided in paragraph (c) of this section, if the annuity of an employee or Member commences after January 3, 1988, and before October 1, 1989, the lump-sum credit payable under § 842.705 is payable to the individual, or his or her survivors, according to the following schedule:

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(1) Sixty percent of the lump-sum credit is payable at the time of retirement, and

(2) Forty percent is payable, with interest determined under section 8334(e)(3) of title 5, United States Code, one year after the time of retirement.

(b) If an employee or Member whose annuity commences after January 3, 1988, and before October 1, 1989, dies before the time limit prescribed in §842.704(b)(2), that individual is subject to §842.704 (c) or (d), but the lump-sum credit will be paid in accordance with the schedule in paragraph (a) of this section.

(c) An annuitant is exempt from the deferred payment schedule under paragraph (a) of this section if the individual—

(1) Separates involuntarily, other than for cause on charges of delinquency or misconduct, or

(2) Has, at the time of retirement, a life-threatening affliction or other critical medical condition.

(3)(i) For the purpose of this section, *life-threatening affliction or other critical medical condition* means a medical condition so severe as to reasonably limit an individual's probable life expectancy to less than 2 years.

(ii) The existence of one of the following medical conditions is *prima facie* evidence of a life-threatening affliction or other critical medical condition:

(A) Metastatic and/or inoperable neoplasms.

(B) Aortic stenosis (severe).

(C) Class IV cardiac disease with congestive heart failure.

(D) Respiratory failure.

(E) Cor pulmonale with respiratory failure.

(F) Emphysema with respiratory failure.

(G) [Reserved]

(H) Severe cardiomyopathy—Class IV.

(I) Aplastic anemia.

(J) Uncontrolled hypertension with hypertensive encephalopathy.

(K) Cardiac aneurysm not amenable to surgical treatment.

(L) Agranulocytosis.

(M) Severe hepatic failure.

(N) Severe hypoxic brain damage.

(O) Severe portal hypertension with esophageal varices.

(P) AIDS (Active—Not AIDS Related Complex or only seropositivity).

(Q) Life-threatening infections (encephalitis, meningitis, rabies, etc.).

(R) Scleroderma with severe esophageal involvement.

(S) Amyotrophic lateral sclerosis (rapidly progressive).

(T) Hemiplegia with life threatening complications.

(U) Quadriplegia with life threatening complications.

(iii) Evidence of the existence of a life-threatening affliction or other critical medical condition must be certified by a physician and sent to OPM on or before the date the annuitant elects to receive an alternative form of annuity. For the purpose of this section, "physician" has the same meaning given that term in §339.102 of this chapter.

(iv) If a medical condition other than those listed in paragraph (c)(3)(ii) of this section is claimed as a basis for exemption from the deferred payment schedule, OPM will review the physician's certification to determine whether the cited condition is life-threatening or critical.

(v) The cost of providing medical documentation under this paragraph rests with the employee or Member, unless OPM exercises its choice of physician.

[53 FR 11635, Apr. 8, 1988, as amended at 60 FR 54587, Oct. 25, 1995]

**§842.708 Partial deferred payment of the lump-sum credit if annuity commences after December 2, 1989, and before October 1, 1995.**

(a) Except as provided in paragraph (c) of this section, if the annuity of a retiree commences after December 2, 1989, and before October 1, 1994, the lump-sum credit payable under §842.705 is payable to the individual, or his or her survivors, according to the following schedule:

(1) Fifty percent of the lump-sum credit is payable at the time of retirement, and

(2) Fifty percent is payable, with interest determined under section 8334(e)(3) of title 5, United States Code, one year after the time of retirement, except if the payment date of the amount specified in paragraph (a)(1) of this section was after December 4, 1989,

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payment with interest will be made in the calendar year following the calendar year in which the payment specified in paragraph (a)(1) of this section was made.

(b) If a retiree whose annuity commences after December 2, 1989, and before October 1, 1994, dies before the time limit prescribed in § 842.704(b)(2), that individual is subject to § 842.704 (c) or (d), but the lump-sum credit will be paid in accordance with the schedule in paragraph (a) of this section.

(c)(1) A retiree is exempt from the deferred payment schedule under paragraph (a) of this section if the individual meets the conditions, and fulfills the requirements, described in § 842.707(c).

(2)(i) A retiree who is exempt from the deferred payment schedule may waive that exemption by notifying OPM, in writing, on or before the date he or she elects to receive the alternative form of annuity.

(ii) Paragraph (c)(2)(i) of this section does not apply to an individual whose annuity commences after December 1, 1990, if that individual's eligibility to elect an alternative form of annuity is pursuant to § 842.703(d)(1)(i)(A).

(iii) A waiver under paragraph (c)(2)(i) of this section cannot be revoked.

[56 FR 6552, Feb. 19, 1991, as amended at 60 FR 54587, Oct. 25, 1995]

## Subpart H—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

SOURCE: 52 FR 2069, Jan. 16, 1987, unless otherwise noted.

### § 842.801 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

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(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110–161, 121 Stat. 2042.

[76 FR 42000, July 18, 2011]

### § 842.802 Definitions.

In this subpart—

*Agency head* means, for the executive branch agencies, the head of an executive agency as defined in 5 U.S.C. 105; for the legislative branch, the Secretary of State, the Clerk of the House of Representatives, or the head of any other legislative branch agency; for the judicial branch, the Director of the Administrative Office of the U.S. Courts; for the Postal Service, the Postmaster General; and for any other independent establishment that is an entity of the Federal Government, the head of the establishment. For the purpose of an approval of coverage under this subpart, *agency head* is also deemed to include the designated representative of the head of an executive department as defined in 5 U.S.C. 101, except that, for provisions dealing with law enforcement officers and firefighters, the designated representative must be a department headquarters-level official who reports directly to the executive department head, or to the deputy department head, and who is the sole such representative for the entire department. For the purpose of a denial coverage under this subpart, *agency head* is also deemed to include the designated representative of the *agency head*, as defined in the first sentence of this definition, at any level within the agency.

*Air traffic controller* means a civilian employee of the Department of Transportation or the Department of Defense

in an air traffic control facility or flight service station facility who is actively engaged in the separation and control of air traffic or in providing preflight, inflight, or airport advisory service to aircraft operators, or who is the immediate supervisor of such an employee, as provided by 5 U.S.C. 8401(35)(A). Also included in this definition is a civilian employee of the Department of Transportation or the Department of Defense who is the immediate supervisor of a person described under 5 U.S.C. 2109(1)(B) (*i.e.*, a second-level supervisor), as provided by 5 U.S.C. 8401(35)(B).

*Detention duties* means duties that require frequent direct contact in the detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation of individuals suspected or convicted of offenses against the criminal laws of the United States or the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (chapter 47 of title 10, United States Code). (See 5 U.S.C. 8401(17).)

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*Firefighter* means an employee occupying a rigorous position, whose primary duties are to perform work directly connected with the control and extinguishment of fires, as provided in 5 U.S.C. 8401(14). Also included in this definition is an employee occupying a rigorous firefighter position who moves to a supervisory or administrative position and meets the conditions of § 842.803(b).

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do *not* have subordinate supervisors. A first-level supervisor may occupy a rigorous position or a secondary position if the appropriate definition is met.

*Frequent direct contact* means personal, immediate, and regularly-assigned contact with detainees while performing detention duties, which is repeated and continual over a typical work cycle.

*Law enforcement officer* means an employee occupying a rigorous position, whose primary duties are the inves-

tigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or the protection of officials of the United States against threats to personal safety, as provided in 5 U.S.C. 8401(17). Also included in this definition is an employee occupying a rigorous law enforcement officer position who moves to a supervisory or administrative position and meets the conditions of § 842.803(b). *Law enforcement officer* also includes, as required by 5 U.S.C. 8401(17)(B), an employee of the Department of the Interior or the Department of the Treasury who occupies a position that, but for enactment of chapter 84 of title 5, United States Code, would be subject to the District of Columbia Police and Firefighters' Retirement System, as determined by the Secretary of the Interior or the Secretary of the Treasury, as appropriate. Except as provided above, the definition does not include an employee whose primary duties involve maintaining order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than those who are suspected or convicted of offenses against the criminal laws of the United States.

*Primary duties* means those duties of a position that—

(a) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(b) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(c) Are assigned on a regular and recurring basis.

Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Rigorous position* means a position the duties of which are so rigorous that employment opportunities should, as soon as reasonably possible, be limited (through establishment of a maximum entry age and physical qualifications)

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to young and physically vigorous individuals whose primary duties are—

(a) To perform work directly connected with controlling and extinguishing fires; or

(b) Investigating, apprehending, or detaining individuals suspected or convicted of offenses against the criminal laws of the United States or protecting the personal safety of United States officials.

The condition in this definition that employment opportunities be limited does not apply with respect to an employee who moves directly (i.e., without a break in service exceeding 3 days) from one rigorous law enforcement officer position to another or from one rigorous firefighter position to another. *Rigorous position* is also deemed to include a position held by a law enforcement officer as identified in 5 U.S.C. 8401(17)(B) (related to certain employees in the Departments of the Interior and the Treasury).

*Secondary position* means a position that—

(a) Is clearly in the law enforcement or firefighting field;

(b) Is in an organization having a law enforcement or firefighting mission; and

(c) Is either—

(1) Supervisory; that is, a position whose primary duties are as a first-level supervisor or law enforcement officers or firefighters in rigorous positions; or

(2) Administrative; that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a rigorous law enforcement or firefighting position, or equivalent experience outside the Federal Government, is a mandatory prerequisite.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32689–32690, July 23, 1992; 60 FR 3339, Jan. 17, 1995; 66 FR 38525, July 25, 2001; 70 FR 32710, June 6, 2005; 70 FR 42254, July 22, 2005]

**§ 842.803 Conditions for coverage.**

(a) *Rigorous positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a rigorous law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a rigorous position is not covered under the provisions of 5 U.S.C. 8412(d).

(3) A first-level supervisor position may be determined to be a rigorous position if it satisfies the conditions set forth in § 842.802.

(b) *Secondary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a secondary law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d), if all of the following criteria are met:

(i) The employee, while covered under the provisions of 5 U.S.C. 8412(d), moves directly (that is, without a break in service exceeding 3 days) from a rigorous position to a secondary position;

(ii) The employee has completed 3 years of service in a rigorous position, including any such service during which no FERS deductions were withheld; and

(iii) The employee has been continuously employed in a secondary position or positions since moving from a rigorous position without a break in service exceeding 3 days, except that a break in employment in secondary positions that begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(2) An employee who is not a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

(c) *Air traffic controller.* An employee's service in a position that has been determined to be an air traffic controller position by the employing agency head is covered under the provisions of 5 U.S.C. 8412(e).

(d) Except as specifically provided in this subpart, an agency head's authority under this section cannot be delegated.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992]

**§ 842.804 Evidence.**

(a) An agency head's determination under § 842.803(a) (finding that a position is a rigorous position) must be based solely on the official position description of the position in question and any other official description of duties and qualifications. The official documentation for the position should, as soon as is reasonably possible, establish that the primary duties of the position are so rigorous that the agency does not allow individuals to enter the position if they are over a certain age or if they fail to meet certain physical qualifications (that is, physical requirements and/or medical standards), as determined by the employing agency head based on the personnel management needs of the agency for the positions in question.

(b) A determination under §§ 842.803 (b) or (c) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(2)(B), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992]

**§ 842.805 Withholding and contributions.**

(a) During service covered under the conditions established by § 842.803 (a), (b), or (c), the employing agency will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a)(2)(B) and submit

that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the employing agency must submit to OPM the Government contributions required under 5 U.S.C. 8423(a)(1)(B) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholdings and/or Government contributions are not timely submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, an employing agency or former employing agency will pay a refund or erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a rigorous, secondary, or air traffic controller position is detailed or

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temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a rigorous, secondary, or air traffic controller position is detailed or temporarily promoted to a position that is not a rigorous, secondary, or air traffic controller position, the additional withholdings and agency contributions will continue to be made.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992; 60 FR 3340, Jan. 17, 1995]

### § 842.806 Mandatory separation.

(a) The mandatory separation provisions of 5 U.S.C. 8425 apply to all law enforcement officers and firefighters, including those in secondary positions, and air traffic controllers, with the exception of a civilian employee of the Department of Transportation or the Department of Defense who is the immediate supervisor of a person described under 5 U.S.C. 2109(1)(B) (*i.e.*, a second-level supervisor). A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412 (d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

[52 FR 2069, Jan. 16, 1987, as amended at 70 FR 32710, June 6, 2005]

### § 842.807 Review of decisions.

(a) The final decision of an agency head denying an individual's request for approval of a position as a rigorous,

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secondary, or air traffic controller position made under § 842.804(c) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of an agency head denying an individual coverage while serving in an approved secondary position because of failure to meet the conditions in § 842.803(b) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

[66 FR 38525, July 25, 2001]

### § 842.808 Oversight of coverage determinations.

(a) Upon deciding that a position is a law enforcement officer or firefighter position, each agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, whether the position is rigorous or secondary, and, if the position is rigorous, the established maximum entry age (or if no maximum entry age has yet been established, the date by which it will be established). The Director of OPM retains the authority to overrule an agency head's determination that a position is a rigorous or secondary position, except such a determination under 5 U.S.C. 8401(17)(B) (concerning certain employees in the Departments of the Interior and the Treasury) or under 5 U.S.C. 8401(17)(D) (concerning certain positions primarily involved in detention activities).

(b) Each agency must establish a file containing all coverage determinations made by an agency head under § 842.803, and all background material used in making the determination.

(c) Upon request by OPM, the agency will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, an agency must submit to OPM a list of all covered positions and any other pertinent information requested. For rigorous

positions, the list must show the specific entry age requirement and physical qualification requirements for each position.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32691, July 23, 1992]

#### § 842.809 Transitional provisions.

(a) Any service as an air traffic controller, within the meaning of this term under 5 U.S.C. 2109 as in effect on or after January 1, 1987—even if performed before that date—is included in determining an employee's length of air traffic controller service under 5 U.S.C. 8412(e) for the purposes of retirement eligibility and for mandatory separation under 5 U.S.C. 8425(a) as long as the annuity is based on a separation from service occurring after 1986.

(b) Any service as a law enforcement officer or firefighter, within the meaning of these terms under 5 U.S.C. 8331(20) and (21), that was performed before the date on which an employee becomes subject to chapter 84 of title 5, United States Code, is included in determining the employee's length of law enforcement officer and firefighter service under 5 U.S.C. 8412(d) for the purposes of retirement eligibility and mandatory separation under 5 U.S.C. 8425(b). Service performed as a law enforcement officer or firefighter within the meaning of 5 U.S.C. 8331, other than service in a supervisory or administrative position, is considered to be service in a rigorous position for the purpose of the 3-year requirement of § 842.803(b)(1)(ii). The FERS definitions of firefighter under 5 U.S.C. 8401(14) and law enforcement officer under 5 U.S.C. 8401(17) are not applicable to service performed—

(1) Before 1987; or

(2) After 1986 and before an employee first becomes subject to chapter 84 (that is, subject to FERS deductions), unless that service was neither subject to CSRS deductions nor creditable in a CSRS component as described in § 846.304(b).

(c)(1) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or administrative position, having already met the

transfer requirement of subpart I of part 831 of this chapter; and

(ii) Elects under section 301 of Pub. L. 99-335 to become subject to chapter 84 of such title and begins service in a secondary position with no break in service is considered to have met the transfer and 3-year requirements of §§ 842.803(b)(1)(i) and (ii) for coverage in a secondary position upon the effective date of the election.

(2) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or administrative position, having already met the transfer requirement of subpart I of part 831 of this chapter; and

(ii) Automatically becomes subject to chapter 84 of title 5 of the United States Code (not by election under section 301 of Pub. L. 99-335) serving in a secondary position is considered to have met the 3-year requirement of § 842.803(b)(1)(ii) for coverage in a secondary position. The employee is not covered as a law enforcement officer or firefighter in a secondary position if he or she had a break in coverage as a law enforcement officer or firefighter (within the meaning of 5 U.S.C. 8331) exceeding 3 days immediately before becoming subject to chapter 84 of title 5 of United States Code. However, a break in coverage in supervisory or administrative positions occurring before the individual becomes subject to such chapter 84 that began with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered to be a break in service for this purpose.

(d) (1) The CSRS definitions of law enforcement officer under 5 U.S.C. 8331(20) and firefighter under 5 U.S.C. 8331(21) are applicable to service performed before an employee became subject to chapter 84 if the service was—

(i) Subject to CSRS deductions at the time it was performed (including service that becomes creditable under FERS annuity computation rules);

(ii) Performed before 1987 and not subject to retirement deductions; or

(iii) Performed after 1986 and not subject to retirement deductions but is creditable in a CSRS component as described in § 846.304(b).

(2) The determination of whether any service meets the CSRS definitions of law enforcement officer under 5 U.S.C. 8331 (20) or firefighter under 5 U.S.C. 8331(21) must be made in accordance with the provisions of subpart I of part 831 of this chapter.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32691, July 23, 1992]

REGULATIONS PERTAINING TO  
NONCODIFIED STATUTES

**§ 842.810 Elections to be deemed a law enforcement officer for retirement purposes by certain police officers employed by the Metropolitan Washington Airports Authority (MWAA).**

(a) *Who may elect.* Metropolitan Washington Airports Authority (MWAA) police officers employed as members of the MWAA police force as of December 21, 2000, who are covered by the provisions of the Federal Employees Retirement System by 49 U.S.C. 49107(b) may elect to be deemed a law enforcement officer for retirement purposes and have past service as a member of the MWAA and Federal Aviation Administration police forces credited as law enforcement officer service.

(b) *Procedure for making an election.* Elections by an MWAA police officer to be treated as a law enforcement officer for retirement purposes must be made in writing to the MWAA and filed in the employee's personnel file in accordance with procedures established by OPM in consultation with the MWAA.

(c) *Time limit for making an election.* An election under paragraph (a) of this section must be made either before the MWAA police officer separates from service with the MWAA or July 25, 2002, whichever occurs first.

(d) *Effect of an election.* An election under paragraph (a) of this section is effective on the beginning of the first pay period following the date of the MWAA police officer's election.

(e) *Irrevocability.* An election under paragraph (a) of this section becomes irrevocable when received by the MWAA.

(f) *Employee payment for past service.* (1) An MWAA police officer making an election under this section must pay an amount equal to the difference between

law enforcement officer retirement deductions and retirement deductions actually paid by the police officer for the police officer's past police officer service with the Metropolitan Washington Airports Authority and Federal Aviation Administration. The amount paid under this paragraph shall be computed with interest in accordance with 5 U.S.C. 8334(e) and paid to the MWAA prior to separation.

(2) Starting with the effective date under paragraph (d) of this section, the MWAA must make deductions and withholdings from the electing MWAA police officer's base pay in accordance with 5 CFR 832.805.

(g) *Employer contributions.* (1) Upon the police officer's payment for past service credit under paragraph (f) of this section, the MWAA must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the additional agency retirement contribution amounts required for the police officer's past service, plus interest.

(2) Starting with the effective date under paragraph (d) of this section, the MWAA must make agency contributions for the electing police officer in accordance with 5 CFR 842.805.

(h) *Mandatory Separation.* (1) An MWAA police officer who elects to be treated as a law enforcement officer for FERS retirement purposes is subject to the mandatory separation provisions of 5 U.S.C. 8425(b) and 5 CFR 831.502.

(2) The President and Chief Operating Officer of the MWAA is deemed to be the head of an agency for the purpose of exempting an MWAA police officer from mandatory separation in accordance with the provisions of 5 U.S.C. 8425(b) and 5 CFR 831.502(b)(1).

(i) *Reemployment.* An MWAA police officer who has been mandatorily separated under 5 U.S.C. 8425(b) is not barred from reemployment in any position except a FERS rigorous or secondary law enforcement officer position after age 60. Service by a reemployed former MWAA police officer who retired under 5 U.S.C. 8412(d) is not covered by the provisions of 5 U.S.C. 8412(d).

[66 FR 38525, July 25, 2001]

**§ 842.811 Deposits for second-level supervisory air traffic controller service performed before February 10, 2004.**

(a)(1) *Eligibility—current and former employees, and retirees.* A current or former employee, or a retiree who was employed as a civilian employee of the Department of Transportation or the Department of Defense before February 10, 2004, as the immediate supervisor of a person described in 5 U.S.C. 2109(1)(B) may make a deposit for such service, in a form prescribed by OPM, so that such service may be credited as air traffic controller service for FERS purposes subject to paragraph (h) of this section.

(2) *Eligibility—survivors.* A survivor of a current employee, former employee, or a retiree eligible to make a deposit under paragraph (a)(1) of this section may make a deposit under this section when the current or former employee, or a retiree—

(i) Dies during the period beginning February 10, 2004, and ending November 28, 2006, without submitting an application under this section; or

(ii) Dies after submitting an application to make a deposit under this section within the time limit set out in paragraph (c) of this section without completing a deposit.

(b) *Filing of deposit application.* An individual eligible to make a deposit under paragraph (a) of this section for service described under paragraph (a)(1) of this section must submit a written application to make a deposit for such service with the appropriate office in the agency where such service was performed.

(c) *Time limit for filing application.* An application to make a deposit under this section must be submitted on or before November 28, 2006.

(d)(1) *Amount of deposit.* A deposit under this section shall be computed using distinct periods of service. For the purpose of this section, a distinct period of service means a period of service not interrupted by a break in service of more than 3 days. A deposit may be made for a distinct period of service; however, such a deposit shall be ineffective if deposits are not completed for all distinct periods of service described under paragraph (a) of this section.

(2) The amount of deposit under this section shall be an amount equal to the amount by which the deductions from pay which would have been required under 5 U.S.C. chapter 84, subchapter II, if at the time the service was performed the service had been air traffic controller service exceeds the unrefunded deductions or deposits actually made under 5 U.S.C. chapter 84, subchapter II, with respect to such service, plus interest.

(e)(1) *Interest.* Interest shall be computed as described under paragraphs (2) and (3) of 5 U.S.C. 8334(e). Interest shall be computed for each distinct period of service from the midpoint of the distinct period of service.

(2) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case.

(f) *Forms of deposit.* A deposit under this section may be made as a single lump sum or in installments.

(g)(1) *Processing deposit applications and payments.* Upon receiving an application for deposit under this section, the agency shall determine whether the application meets the requirements of this section; compute the deposit, including interest; and advise the applicant of the total amount of deposit due.

(2) The agency shall establish a deposit account showing the total amount due and a payment schedule (unless deposit is made in one lump sum) to record the date and amount of each payment.

(3) If an eligible individual cannot make payment in one lump sum, the agency shall accept installment payments (by allotments or otherwise). The agency, however, is not required to accept individual checks in amounts less than \$50.

(4) Payments received by the agency shall be remitted to OPM immediately for deposit to the Civil Service Retirement and Disability Fund.

(5) Once a deposit has been paid in full or otherwise closed out, the agency shall submit the documentation pertaining to the deposit to OPM in accordance with instructions issued by OPM.

(h) *Effect of deposit.* An individual completing a deposit under this section

whose entitlement to an annuity is based on a separation from service on or after February 10, 2004, will receive air traffic controller retirement credit for such service, for annuity entitlement and computation purposes, when OPM receives certification that the deposit has been paid in full, and the deposit payment is remitted to the Civil Service Retirement and Disability Fund.

[70 FR 32710, June 6, 2005]

### Subpart I—Nuclear Materials Couriers

SOURCE: 65 FR 2524, Jan. 18, 2000, unless otherwise noted.

#### § 842.901 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844.

[76 FR 42000, July 18, 2011]

#### § 842.902 Definitions.

*Agency head* means the Secretary of Energy. For purposes of this subpart, *agency head* is also deemed to include

the designated representative of the Secretary of Energy, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Energy, or to the Deputy Secretary of Energy, and who is the sole such representative for the entire department.

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*Nuclear materials courier* means an employee of the Department of Energy, the duties of whose position are primarily to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security, including an employee engaged in this activity who is transferred directly to a supervisory or administrative position within the same Department of Energy organization, after performing this activity for at least 3 years. (See 5 U.S.C. 8331(27).)

*Primary duties* means those duties of a position that—

(1)(i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(iii) Are assigned on a regular and recurring basis.

(2) Duties that are of an emergency, incidental, or temporary nature cannot be considered “primary” even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Primary position* means a position that is in an organization of the Department of Energy and whose primary duties are to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security.

*Secondary position* means a position that—

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(1) Is clearly in the nuclear materials transportation field;

(2) Is in an organization of the Department of Energy having a nuclear materials transportation mission; and

(3) Is either—

(i) Supervisory; that is, a position whose primary duties are as a first-level supervisor of nuclear materials couriers in primary positions; or

(ii) Administrative; that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary nuclear materials courier position is a prerequisite.

### § 842.903 Conditions for coverage in primary positions.

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8412(d).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8412(d).

### § 842.904 Conditions for coverage in secondary positions.

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a secondary nuclear materials courier position following 3 years of service in a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8412(d) if all of the following criteria are met:

(1) The employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered in determining whether the service in sec-

ondary positions is continuous for this purpose.

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

### § 842.905 Evidence.

(a) The Secretary of Energy's determination under § 842.903 that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 842.902.

(b) A determination under § 842.904 must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(3), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

### § 842.906 Requests from individuals.

(a) An employee who requests credit for service under 5 U.S.C. 8412(d) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her

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service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's current service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for current service must be made within 6 months after entering the position or after any significant change in the position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit may request the agency head to determine whether or not the employee's past service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for past service must be made no later than December 31, 2000.

(d) The agency head may extend the time limit for filing under paragraph (b) or (c) of this section when, in the judgment of such agency head, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

**§ 842.907 Withholding and contributions.**

(a) During service covered under the conditions established by § 842.903 (a) or (b), the Department of Energy will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a)(3) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the employing agency must submit to OPM the Government contributions required under 5 U.S.C. 8423(a) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholding and/or Government contributions are not timely submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates,

the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, an employing agency or former employing agency will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a primary or secondary position is detailed or temporarily promoted to a position that is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

**§ 842.908 Mandatory separation.**

(a) Effective on and after October 17, 1999, the mandatory separation provisions of 5 U.S.C. 8425 apply to all nuclear materials couriers including those in secondary positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of

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this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412 (d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

### § 842.909 Review of decisions.

The following decisions may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board:

(a) The final decision of the Department of Energy issued to an employee, former employee, or survivor as the result of a request for determination filed under § 842.906; and

(b) The final decision of the Department of Energy that a break in service referred to in § 842.904(a)(2) did not begin with an involuntary separation within the meaning of 5 U.S.C. 8414(b)(1)(A).

### § 842.910 Oversight of coverage determinations.

(a) Upon deciding that a position is a nuclear materials courier position, the agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position, or that an individual's service in any other position is creditable under 5 U.S.C. 8412(d).

(b) The Department of Energy must establish a file containing each coverage determination made by the agen-

cy head under § 842.903 and § 842.904, and all background material used in making the determination.

(c) Upon request by OPM, the Department of Energy will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Energy must submit to OPM a list of all covered positions and any other pertinent information requested.

## Subpart J—Customs and Border Protection Officers

SOURCE: 76 FR 42001, July 18, 2011, unless otherwise noted.

### § 842.1001 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110-161, 121 Stat. 1844.

### § 842.1002 Definitions.

As used in this subpart:

*Agency head* means the Secretary of the Department of Homeland Security. For purposes of an approval of coverage under this subpart, agency head is also

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deemed to include the designated representative of the Secretary of Department of Homeland Security, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Homeland Security, or to the Deputy Secretary of Homeland Security, and who is the sole such representative for the entire department. For the purposes of a denial of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of Department of Homeland Security at any level within the Department of Homeland Security.

*Customs and border protection officer* means an employee in the Department of Homeland Security occupying a position within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position and whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry. Also included in this definition is an employee engaged in this activity who is transferred directly to a supervisory or administrative position in the Department of Homeland Security after performing such duties in 1 or more positions within the GS–1895 job series (determined applying the criteria in effect as of September 1, 2007), or any successor position, for at least 3 years.

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors. A first-level supervisor may occupy a primary position or a secondary position if the appropriate definition is met.

*Primary position* means a position classified within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position whose duties include the performance of work directly connected with activities relating to the arrival and departure of persons, con-

veyances, and merchandise at ports of entry.

*Secondary position* means a position within the Department of Homeland Security that is either—

(1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of customs and border protection officers in primary positions; or

(2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary customs and border protection officer position is a prerequisite.

**§ 842.1003 Conditions for coverage.**

(a) *Primary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a primary customs and border protection officer position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

(3) A first-level supervisor position may be determined to be a primary position if it satisfies the conditions set forth in § 842.1002.

(b) *Secondary positions.* An employee's service in a position that has been determined by the employing agency head to be a secondary position is covered under the provisions of 5 U.S.C. 8412(d) if all of the following criteria are met:

(1) The employee, while covered under the provisions of 5 U.S.C. 8412(d) as a customs and border protection officer, is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) The employee has completed 3 years of service in a primary position, including service for which no FERS deductions were withheld; and

(3) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in

secondary positions which begins with an involuntary separation (not for cause), within the meaning of 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(c) For the purpose of applying the criteria at paragraph (b)(1) through (3) of this section to evaluate transfers, service, and employment periods that occurred before September 1, 2007—

(1) A primary position, covered under the provisions of 5 U.S.C. 8412(d), is deemed to include:

(i) A position whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry that was classified within the Immigration Inspector Series (GS-1816), Customs Inspector Series (GS-1890), Canine Enforcement Officer Series (GS-1801), or any other series which the agency head determines were predecessor series to the Customs and Border Protection Series (GS-1895), and that would have been classified under the GS-1895 series had it then existed; and

(ii) A position within the Customs and Border Protection Series (GS-1895) whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

(2) A secondary position is deemed to include:

(i) A first-level supervisor of an employee in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section; or

(ii) A executive, managerial, technical, semiprofessional, or professional position for which experience in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section is a mandatory prerequisite.

(d) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

#### § 842.1004 Evidence.

(a) The agency head's determination under §842.1003(a) that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in §842.1002.

(b) A determination under §842.1003(b) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(3), and the employee does not, within 6 months of entering the position formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

#### § 842.1005 Withholding and contributions.

(a) During service covered under the conditions established by §842.1003(a) or (c), the Department of Homeland Security will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the Department of Homeland Security must submit to OPM the Government contributions required under 5 U.S.C. 8423(a) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholdings and/or Government contributions are not timely submitted to OPM for any reason whatsoever, including cases in

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which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the Department of Homeland Security must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the Department of Homeland Security waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, the Department of Homeland Security will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or reposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a primary or secondary position is detailed or temporarily promoted to a position that is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

**§ 842.1006 Mandatory separation.**

(a) Except as provided in paragraph (d) of this section, the mandatory separation provisions of 5 U.S.C. 8425 apply to customs and border protection offi-

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cers, including those in secondary positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412(d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

(d) The customs and border protection officer mandatory separation provisions of 5 U.S.C. 8425 do not apply to an individual first appointed as a customs and border protection officer before July 6, 2008.

**§ 842.1007 Review of decisions.**

(a) The final decision of the agency head denying an individual's request for approval of a position as a primary or secondary customs and border protection officer position made under § 842.1003(a) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of the agency head denying an individual coverage while serving in an approved secondary position because of failure to meet the conditions in § 842.1003(b) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

**§ 842.1008 Oversight of coverage determinations.**

(a) Upon deciding that a position is a customs and border protection officer, the Department of Homeland Security must notify OPM (Attention: Associate Director, Retirement Services, or such other official as may be designated)

stating the title of each position, the occupational series of the position, the number of incumbents, whether the position is primary or secondary, and, if the position is a primary position, the established maximum entry age, if one has been established. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position.

(b) The Department of Homeland Security must establish and maintain a file containing all coverage determinations made by the agency head under §842.1003(a) and (b), and all background material used in making the determination.

(c) Upon request by OPM, the Department of Homeland Security will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Homeland Security must submit to OPM a list of all covered positions and any other pertinent information requested.

**§ 842.1009 Elections of retirement coverage, exclusions from retirement coverage, and proportional annuity computations.**

(a) *Election of coverage.* (1) The Department of Homeland Security must provide an individual who is a customs and border protection officer on December 26, 2007, with the opportunity to elect not to be treated as a customs and border protection officer under section 535(a) and (b) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, 121 Stat. 2042.

(2) An election under this paragraph is valid only if made on or before June 22, 2008.

(3) An individual eligible to make an election under this paragraph who fails to make such an election on or before June 22, 2008, is deemed to have elected to be treated as a customs and border protection officer for retirement purposes.

(b) *Exclusion from coverage.* The provisions of this subpart and any other specific reference to customs and border protection officers in this part do not

apply to employees who on December 25, 2007, were law enforcement officers, under subpart H of this part or subpart I of part 831, within U.S. Customs and Border Protection. These employees cannot elect to be treated as a customs and border protection officer under paragraph (a) of this section, nor can they be deemed to have made such an election.

(c) *Proportional annuity computation.* The annuity of an employee serving in a primary or secondary customs and border protection officer position on July 6, 2008, must, to the extent that its computation is based on service rendered as a customs and border protection officer on or after that date, be at least equal to the amount that would be payable—

(1) To the extent that such service is subject to the Civil Service Retirement System, by applying section 8339(d) of title 5, United States Code, with respect to such service; and

(2) To the extent such service is subject to the Federal Employees' Retirement System, by applying section 8415(d) of title 5, United States Code, with respect to such service.

**PART 843—FEDERAL EMPLOYEES RETIREMENT SYSTEM—DEATH BENEFITS AND EMPLOYEE REFUNDS**

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